No. 3110.

United States

Circuit Court of Appeals

For the Ninth Circuit

I. F. SEARLE, MINNIE A. GIBBS and MERRILL, COX & COMPANY, Creditors of the Estate of Stack-Gibbs Lumber Company, Bankrupt,

Appellants,

vs.

MECHANICS LOAN & TRUST COMPANY and EXCHANGE NATIONAL BANK OF SPOKANE, Creditors of Stack-Gibbs Lumber Company,

Appellees.

IN THE MATTER OF STACK-GIBBS LUMBER COMPANY, Bankrupt.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

HARRY L. COHN,
501 Mohawk Block, Spokane, Washington,
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THE FRANKLIN PRESS, SPOKANE

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I.

THE COURT EXCEEDED ITS JURISDICTION IN ENTERING THE ORDER COMPLAINED OF IN WHICH IT AWARDED TO THE MECHANICS LOAN AND TRUST COMPANY AND EXCHANGE NATIONAL BANK THE DIVIDENDS PAYABLE TO APPELLANTS.

Taft vs. Century Savings Bank,
15 A. B. R. 597;
141 Fed. 396.
(C. C. A. Ia.)

Edelstein vs. United States,
149 Fed. 636 (638).
(C. C. A. 8th Cir.)

Re Colombia Real Estate Company,
101 Fed. 965 (970).
(App. Dism. 112 Fed. 643.)

Re Billings, 145 Fed. 395 (400).

Re Girard Glazed Kid Co.,
136 Fed. 511.

Re Hollander, 181 Fed. 1019.

Re American Electric Telephone Co.,
211 Fed. 88 (90).
(C. C. A. 7th Cir.)

Stires vs. First National Bank,
119 N. W. Rep. 258.

Denny vs. McCown,
34 Ore. 47;
54 Pac. 955.

Wiggins vs. Columbian Fireproofing Co.,
227 Pa. 511;
76 Atl. 742.

Brauer vs. Laughlin,
235 Ill. 265;
85 N. E. 283.

Fulton vs. Fisher,
239 Mo. 116;
143 S. W. 438.

Davis vs. Silverton,
47 Ore. 171;
82 Pac. 16.

Lewis Pub. Co. vs. Wyman,
182 Fed. 13 (18).
(C. C. A. 8th Cir.)

Linden Inv. Co. vs. Houstain Bros. Co.,
221 Fed. 178.
(C. C. A.)

Henrie vs. Henderson,
145 Fed. 316.
(C. C. A. 4th Cir.)

II.

PAROL EVIDENCE IS INADMISSIBLE FOR THE PURPOSE OF VARYING THE UNEQUIVOCAL TERMS OF THE "TRUST AGREEMENT" THEREBY PERMITTING THE SUBSTITUTION OF THE EXCHANGE NATIONAL BANK FOR THE MECHANICS LOAN AND TRUST COMPANY.

American National Bank vs. Harlan,
89 Md. 675;
43 Atl. 756.

Evans vs. Duncan,
82 Ia. 401;
48 N. W. 922.

Young America Engine Co. vs. City of Sacramento,
47 Cal. 594.

Union National Bank vs. International Bank,
22 Ill. App. 652 (655),
(Affd. 123 Ill. 510).

Newberry Land Co. vs. Newberry,
95 Va. 119;
27 S. E. 899.

III.

THE EXCHANGE NATIONAL BANK IS A MERE VOLUNTEER, AND THEREFORE NOT ENTITLED TO BE SUBROGATED TO THE SECURITY HELD BY THE MECHANICS LOAN AND TRUST COMPANY.

Aetna Life Insurance Company,

vs.

Middleport,

124 U. S. 534,

31 L. Ed. 537,

(and cases cited).

McKinnon

vs.

New York Assets Realization Company,

217 Fed. 339.

Citizens Trust Company,

vs.

Mullunix,

235 Fed. 875.

IV.

THE TRUSTEE ACTED IN BAD FAITH, THEREFORE NOT ONLY IT BUT THE EXCHANGE NATIONAL BANK, WHICH CLAIMS IN PRIVITY WITH IT, SHOULD BE DENIED ALL PRIORITY.

V.

THE TRUST AGREEMENT NEVER BECAME OPERATIVE, DUE TO THE FACT THAT NINETY PER CENT OF THE CREDITORS NEVER EXECUTED THE SAME, THEREFORE NO CLAIM FOR PRIORITY THEREUNDER CAN BE MAINTAINED, AND PAROL EVIDENCE TO VARY THE CONDITION PRECEDENT IS INADMISSIBLE AND SHOULD HAVE BEEN EXCLUDED.

Lawrence vs. Davis,
Fed. Cas. No. 8137.

Bell vs. Mendenhall,
78 Minn. 57;
80 N. W. Rep. 843.

STATEMENT OF FACTS.

(Numbers refer to pages of printed abstract.)

The record upon which this appeal is taken is based upon an order of the District Court of the United States for the Northern District of Idaho, sustaining an order entered by the Hon. L. L. Lewis, Referee in Bankruptcy for said District, presented to the District Court upon certificate for review (78-87).

Owing to the necessity of arguing at length the facts deducible from the evidence and as they appear in the record in our brief and argument to follow this statement, we will undertake merely to give the court at this time an outline of the situation presented.

The Stack-Gibbs Company and the Dryad Lumber Company were practically one concern, the same stockholders, directors and officers (152). The Dryad Lumber Company ran the sawmill. The Stack-Gibbs Lumber Company ran the lumber yard (153). Originally it was one concern, but for reasons not pertinent to this record, the enterprise was divided into two companies, and due to the fact that practically the entire business of the two companies was transacted by the Stack-Gibbs Lumber Company and that whatever is hereinafter stated with respect to either applies as well to the

other, we will eliminate needless repetition and explanation and we will refer only to the "Stack-Gibbs Company."

It appears from the record that in the latter part of the year 1915, the Stack-Gibbs Company became involved in financial difficulties (90-221). As a matter of fact this condition had existed for a period of years, which, however, was unknown to the creditors. The Exchange National Bank then was and still is a National Bank doing business at Spokane, Washington, one E. T. Coman was and is the President. One C. D. Gibbs was the President of the Stack-Gibbs Company and also its representative.

The record shows that Gibbs carried the principal account of his company with Coman's bank (223-237), and that that bank kept in touch with the affairs of the Stack-Gibbs Company (246). The company also borrowed large amounts of money from various other banks throughout the country. A large amount of its paper and the paper of its customers being discounted through the paper house of Merrill, Cox & Company of Chicago, Illinois.

The record also shows that during the latter part of the year 1915, the Stack-Gibbs Company had large overdrafts with the Exchange National Bank running as high as $37,000.00, and that it carried

its account under two headings, "Carrying Account No. 1" and "Balance Account No. 2" (237-251). The excuse being given for No. 2 account was that the Stack-Gibbs Company never maintained any balance and was overdrawing, and that Mr. Coman was attempting to copy the plan of some eastern bank whereby he could always have a balance on hand (246). The bank would therefore have some officer of the Stack-Gibbs Company execute accommodation paper to the Stack-Gibbs Company, which that company would then endorse and discount under the "Balance Account No. 2," and that this account could only be drawn against over the counter signature of Mr. Coman, the President of the Bank (237). The net result of these transactions was that while an observation of "Account No. 2" on the books of the Exchange National Bank would show a balance in favor of Stack-Gibbs Company of $10,000.00, $15,000.00 or $20,000.00, as the case might be, the carrying account on the books of the Exchange National Bank, being "Account No. 1," would dislcose an overdraft of amounts varying from time to time from $200.00 to $37,000.00 (237).

The Stack-Gibbs Company, in carrying its account with the Exchange National Bank, did not so divide the account into two parts as was done by the bank, but carried it all in one account, so that at all times, the books of the company, what-

ever notes were discounted with the Exchange National Bank, whether credited to the balance account or to the carrying account, disclosed the true condition and state of affairs with respect to the transactions between the bank and the Stack-Gibbs Company.

On January 2, 1916, the books of the Stack-Gibbs Company disclosed a large balance on hand in its favor as against the Exchange Bank, whereas the books of the Exchange Bank disclosed the reverse condition. It is accounted for in two ways. The Stack-Gibbs Company was "kiting" checks. Its system was to draw checks on one or two of the various other banks with which it was carrying accounts, and send these checks to the Exchange Banks for credit. Furthermore, the deposits on the Stack-Gibbs books showed a $15,000.00 item balance account—which item becomes of extreme importance in this controversy—whereas the bank on the carrying account did not show these balances (203).

The record discloses that either in the latter part of December, 1915, or in the early part of January, 1916, Mr. Gibbs, President of the Stack-Gibbs Company, informed Mr. Coman, President of the Exchange Bank, with respect to the precarious financial condition of the Stack-Gibbs Company. Of this the record is certain that in January, 1916,

Gibbs discussed with Coman the question and advisability of calling together the creditors of the Stack-Gibbs Company for a consultation (215-246). Under Coman's advice a letter was sent to all the creditors calling a meeting of the company at Minneapolis to be held on the 27th or 28th of January, 1916. A week before the meeting was held, Coman sent a man to the plant of the Stack-Gibbs Company for the express purpose of checking over the financial affairs of that concern (246). The record also discloses that this had previously been done by Mr. Coman.

As to the various other things done by the Exchange Bank and by Coman, its President, from that time until the meeting of the creditors and at that meeting, we will dwell more at length hereafter. Suffice it to say that a meeting was held at which Gibbs and Coman were present.

As a result of that meeting, a certain contract or agreement was entered into wherein Stack-Gibbs Lumber Company, Dryad Lumber Company, C. D. Gibbs, Mechanics Loan & Trust Company appeared as parties of the first part; the Mechanics Loan & Trust Company as "Trustee" appeared as party of the second part, and sundry creditors of the Stack-Gibbs Lumber Company and the Dryad Lumber Company appeared as parties of the third part,

which agreement appears in words and figures as follows (90):

THIS INDENTURE, made this 1st day of February, in the year of our Lord, One Thousand and Nine Hundred and Sixteen, by and between Stack-Gibbs Lumber Company, a corporation organized under the laws of Michigan, hereinafter referred to as the "Lumber Company," Dryad Lumber Company, a corporation organized under the laws of Washington, hereinafter referred to as the "Mill Company," C. D. Gibbs, of Spokane, Washington, hereinafter referred to as "Stockholder," and Mechanics Loan and Trust Company, a corporation organized and existing under the laws of Washington, hereinafter known as "Holder of the Trust Deed," parties of the first part, and Mechanics Loan and Trust Company, a corporation organized and existing under the laws of the State of Washington, hereinafter referred to as the "Trustee," party of the second part, and sundry creditors of the Lumber Company and Mill Company, who have executed this instrument for the purpose of acceding to its terms and becoming bound thereby, who are hereinafter referred to as the "Creditors," party of the third part.

WITNESSETH:

That whereas, the Lumber Company and the Mill

Company have heretofore been and are now engaged in the business of logging and manufacture of lumber and allied products, and as well other business relating thereto, in the course of which business they have incurred indebtedness to divers individuals and corporations;

And whereas, the value of the property of the Lumber Company and the Mill Company considerably exceeds their indebtedness, but nevertheless they are unable to obtain means to pay the indebtedness due and presently to become due;

And whereas, all the parties hereto are agreed that the plan herein outlined for realizing upon the property of the Lumber Company and the Mill Company and securing money to pay their presently due indebtedness and for satisfying their indebtedness is for the best interests of all concerned, and necessary to be adopted in order to avoid the heavy costs and expenses which would attend upon the realizing upon their property and the settlement of their indebtedness through receivership or bankruptcy proceedings;

Now, therefore, in consideration of the premises hereof and of other good and valuable consideration moving between the parties hereto, the said Stack-Gibbs Lumber Company and the said Dryad Lumber Company do hereby assign, transfer, set

over, give, grant, bargain, sell, convey, remise, release and confirm unto the said Mechanics Loan & Trust Company, its successors or assigns, as Trustees as hereinafter set forth, all and singular the hereinafter described property, to-with:

(Here was inserted description of various properties.)

TO HAVE AND TO HOLD to the said Trustee, its successors or assigns, to its and their use forever, but in trust, nevertheless, and for the uses hereinafter described property, to-wit:

1. The Trustee shall forthwith take possession of the trust estate as of an estate in fee simple, and shall have and possess the same power to control, use, manage and dispose of the same, and to incur all proper expenses in connection therewith, as in its judgment shall seem to the best interest of all the parties hereto, as though it was the absolute owner thereof.

2. The Trustee may, in its discretion, but shall not be required to, carry on the whole or any part of the business heretofore conducted by the Lumber Company and the Mill Company; may operate mills, cut logs, saw timbers, manufacture lumber into various forms, and transact any form of business heretofore conducted by the Lumber Company and Mill Company and for such purposes, or any

other purpose which it deems proper and in realizing upon the trust estate, may use any and all of the trust estate as it thinks best, and in carrying on such business it may incur such expense as it thinks necessary to the proper conduct thereof, including necessary maintenance, replacement or supplying of new tools, machinery and apparatus.

3. The Trustee may employ such persons as it deems necessary, officers and employees of the Lumber Company and Mill Company, as well as others, for the proper management, use, enjoyment, and realization upon the trust estate, and may pay such persons so employed reasonable compensations.

4. The Trustee shall collect such debts owing to the Lumber Company and Mill Company as are collectible in the exercise of ordinary diligence, and may take security for, extend time of, compromise, or in any way it thinks proper settle any debt which in its opinion is of doubtful collectibility.

5. The Trustee shall realize upon the trust estate as rapidly as in its judgment it is possible to do so without unreasonable sacrifice thereof, and shall have power to sell and convey any or all of the trust estate at such prices and upon such terms as it considers proper, and its deed or bill of sale shall convey full and complete title to the purchaser

free and clear of all right, title, claim or lien of the Lumber Company or of any other party hereto.

6. The Trustee shall receive as compensation, for its services as Trustee hereunder, the sum of Ten Thousand Dollars ($10,000.00), provided the Trusteeship is terminated within two (2) years from the date hereof, and shall be entitled to reimbursement for sums paid for legal services in the administration of the trust, including the preparation of this instrument.

7. The Trustee may, but shall not be required to, pay the claim of any creditor of the Lumber Company and the Mill Company who does not desire to become or who is deemed inadvisable to have become a party to this Instrument, except as modified in Sec. 10 hereof.

8. The Trustee may institute, conduct or defend any suit or litigation which it considers advisable or necessary to the protection of the trust estate, and it shall be repaid from the trust estate all liability, cost and expense to which it may be put in the course of such litigation, including attorneys' fees.

9. If in the conduct and management of the trust estate damage is done third parties to whom the Trustee is or may be held liable therefor, the Trustee shall be reimbursed and indemnified against

any liability of claim therefor from the trust estate, whether such damage was caused by the negligence or misconduct of its officers, agents, employees or not.

10. The Trustee shall advance such sum of money as it deems necessary to meet the present payroll of the Lumber Company and the Mill Company and to discharge the claims of the creditors who do not execute this instrument as it may deem necessary or requisite to protect the trust estate, not to exceed, however, the sum of One Hundred Thousand ($100,000.00) Dollars, and the Trustee shall have a first and preference claim upon said trust estate for the amount of such advancement and the same shall be repaid to it out of the first proceeds of sales of the trust property or any part thereof or the first proceeds of the collected accounts or bills receivable, together with interest thereon from the date of such advancement at the rate of six per cent per annum.

11. Payments made by the Trustee under the provisions of Section 1 to 10, inclusive, hereof, with interest from the time of payment to reimbursement, as well as the compensation of the Trustee, shall be deemed maintenance charges of the trust estate in preference to any other claims thereupon.

12. The Lumber Company and the Mill Com-

pany may execute notes or may renew existing notes or renew renewal notes for their indebtedness and such other notes or renewals shall have the same right hereunder as have the claims of the creditors in their present form.

13. The Trustee may, but shall not be required to, pay interest accruing upon the interest bearing claims of the creditors, if it has the money in the trust estate which it deems not required for other purposes; provided, however, that any such interest payment shall be pro-rated among all the creditors holding interest bearing claims.

14. The creditors agree that neither this instrument nor anything done or to be done in pursuance of its provisions shall be construed as a preference to any creditor, or any act of bankruptcy but that it is entered into in pursuance of a plan which is considered equitable between all the creditors of the Lumber Company and the Mill Company and which will secure the most advantageous disposal of their property for the benefit of their creditors. The creditors likewise agree that while this instrument remains in effect and no provision hereof is violated, they will not sue the Lumber Company or the Mill Company in any court on their demands nor commence any bankruptcy or receivership proceedings against them. They understand

and agree, also, that the Lumber Company and the Mill Company would not have executed this instrument and that the Trustee would not have consented to act as Trustee hereunder or to assume the obligations herein assumed by it, except upon the express agreement of the creditors in this section contained.

15. The Trustee may select and employ in and about the execution of the trust suitable agents and attorneys and it shall not be held liable for any neglect, omission, mistake or misconduct of any such agent or attorney; if reasonable care has been exercised in the selection, and shall not be held liable for any loss or damage not caused by its own negligence or default. Neither shall it be held to have agreed to pay or be liable for any loss or damage occasioned by its failure to pay any tax, assessment, indebtedness or lien upon the trust estate, save and except the taxes, indebtedness and charges which in the tenth section hereof it has expressly agreed to pay.

16. It is understood that the Central Warehouse Lumber Company of Minneapolis, Minnesota, has advanced to the Lumber Company a sum approximately Thirty-two Thousand ($32,000.00) Dollars under an agreement whereby the amount of such advancement shall be repaid in whole or

in part in lumber, and it is agreed that said Trustee shall recognize said contract and carry out and perform the terms thereof notwithstanding any contrary provision herein contained. It is also agreed that if there should be any other outstanding contracts of similar nature entered into by the Lumber Company or the Mill Company, the Trustee may, in its discretion and according to its best judgment carry out the terms thereof or make such adjustment thereof as it may seem just and proper.

17. If at any time during the continuance of the trust any tax charge or indebtedness shall accrue which would be a lien or charge upon the trust estate superior to the claims of the parties hereto and which, in the opinion of the Trustee, it is to the best interest of the parties hereto be paid, then the Trustee may, but shall not be required to, pay any tax, charge or indebtedness and thereupon the amount so paid, together with interest thereon at the rate of six per cent per annum from the date of payment shall become a charge upon the trust estate and shall be paid out of the first money available therefrom.

18. The trust hereby created shall terminate (a) upon the payment of all the indebtedness owing by the Lumber Company to the parties to

this agreement; (b) upon agreement of the creditors representing at least a majority in amount of the indebtedness of the Lumber Company and who shall have signed the within agreement, to the effect that the trust shall be terminated and the trust estate reconveyed to the Lumber Company and the Mill Company without liability on the part of the Trustee; or (c) upon the disposition of the entire trust estate and the application of its proceeds as herein provided. The creditors signing the within instrument shall make out and file with the Trustee their claims against the Lumber Company and the Mill Company within sixty (60) days from notice of the acceptance of the within trust by the Trustee. Copies of said claims shall be sent by the Trustee to the Lumber Company and the Mill Company and to each creditor who shall have signed the within instrument and if no objection to same be filed with the Truetee within thirty (30) days thereafter, then such claim shall be allowed by the Trustee as filed. The proceeds of the trust estate, after reimbursing the Trustee for advancements, expenses, compensations and other claims mentioned herein, shall be distributed pro rata among the creditors of the Lumber Company and the Mill Company. Upon the termination of the trust and an accounting by the Trustee with the Lumber Company and the

Mill Company and the creditors, and the reimbursement of the Trustee for all sums expended or loaned by it hereunder its trust estate shall be reconveyed to the Lumber Company and the Mill Company.

19. The compensation of the Trustee and the expenses and advancements made by it shall constitute a charge upon the trust estate superior to the indebtedness of any party secured hereby and the Trustee may not be removed nor be deprived of the trust estate in any manner until the payment of its compensation, expenses and advancements have been fully provided for; provided, that upon the failure of the Trustee to accept the trust hereunder and upon its refusal to act after its acceptance, the creditors who have signed this instrument, holding a majority in amount of the indebtedness of the Lumber Company, may by deed appoint a new Trustee.

The Lumber Company and Mill Company agree that they will execute such further and additional conveyance, undertakings and agreements as shall be necessary to fully effectuate the intent of this instrument and best title to all of their property in the Trustee, in trust for the uses and purposes herein provided.

Several copies hereof may be executed and de-

livered and each copy which is duly executed and delivered shall be treated for all purposes as an original instrument.

20. This instrument shall not take effect until creditors representing ninety per cent in amount of the indebtedness of the Lumber Company have attached their signatures hereto and until the holder of the Trust Deed on the property of the Mill Company, which Trust Deed is due, has extended same for a period of two years from date; provided, however, that the debt represented by the Trust Deed shall pro rate with the other creditors who have signed the within instrument as to all distribution of dividends after one year from date hereof.

21. It is further agreed that this instrument shall not take effect until said stockholders shall cause a meeting of the stockholders of said Lumber Company and said Mill Company, to be held immediately, at which the resignations of the present Secretaries and Treasurers of the two companies shall be obtained and also the resignation of one of the Directors of each of said companies, and that Siegmund Katz, of Chicago, Illinois, shall be elected by said stockholders of said Lumber Company and said Mill Company, a Director and Secretary of each of said companies, and provided,

further, that said Katz or any other person that the majority in amount of the creditors of the Lumber Company who shall sign the within instrument, shall name, shall be elected and retained as such Director and officer of such Lumber Company and such Mill Company until the trust created by the within instrument shall be terminated.

It is specifically agreed that the claim of the Shoshone Lumber Company for the sum of Five Thousand ($5,000) Dollars and interest represents the purchase price of timber on which a vendor's lien is retained by the said Shoshone Lumber Company, until the payment of said purchase price and it is agreed that said claim will be paid by the Trustee within six (6) months from date hereof as a preferred claim.

23. It is further agreed that the claim of the Idaho Timber Company is secured by the ownership of the following mark placed upon certain White Pine and Spruce logs landed upon Marble Creek (certain marks here described). Any such logs hereafter delivered to the Lumber Company or to the Mill Company shall be paid for by the Trustee at the rate of Sixteen Dollars per thousand feet board measure for White Pine logs and Six Dollars per thousand feet for Spruce logs and the amount thereof shall be deducted from the claim of the Idaho Timber Company. The balance

of said claim shall pro rate with the other creditors in accordance with the terms of this instrument.

In witness whereof the parties hereunto have set their hands and affixed their corporation seals the day and year first herein written.

This was first signed by the bankrupt, Dryad Lumber Company, and Mechanics Loan and Trust Company, and under separate endorsement was signed as follows:

The undersigned creditors of the Stack-Gibbs Lumber Company and the Dryad Lumber Company to the amounts set opposite their names, hereby become parties to and agree to all the terms and conditions of the foregoing Deed of Trust.
Dated February 1st, 1916.

Creditors	Amount of Claim
Merrill, Cox & Company	$221,250.00
Fort Dearborn National Bank	107,000.00
I. F. Searles	55,000.00
First National Bank, Lincoln	12,500.00
Exchange National Bank, Spokane	6,000.00
Shoshone Lumber Company	5,000.00
Idaho Timber Company	60,000.00
S. H. Hess	30,000.00
J. K. Stack	110,000.00
Genevieve Hess Tolerton	20,465.56
Mamie A. Gibbs	12,725.00

The record discloses that the Mechanics Loan & Trust Company is simply a subsidiary concern of the Exchange National Bank and is practically owned by Coman—the same officers and directors of the Mechanics Loan & Trust Company being the officers and directors of the Exchange National Bank (215).

Various and sundry things were done thereafter and until the 29th day of July, A. D. 1916, at which time a petition of bankruptcy was filed against the Stack-Gibbs Company and upon adjudication following in due course, it appeared that not only had every statement as to assets and liabilities of the Stack-Gibbs Company been false, but that the company then was and long had been utterly absolutely insolvent. In due course of administration the assets were, by the Trustee in Bankruptcy, converted to cash, which cash now remains in the hands of the Trustee undistributed.

During the course of proceedings before the Referee, the Mechanics Loan & Trust Company filed a petition praying that the sum of $100,000.00 which had been loaned to the Stack-Gibbs Lumber Company by the Exchange Bank upon notes aggregating an amount of $90,000.00 given by the Stack-Gibbs Company to the Mechanics Loan & Trust Company and by the Mechanics Loan & Trust Company endorsed *without recourse* and delivered to

the Exchange National Bank, which said last mentioned bank discounted the notes, applying the proceeds thereof to the account and credit of the Stack-Gibbs Company, and the further notes aggregating $10,000.00 executed by the Stack-Gibbs Company and made payable direct to the Exchange National Bank, be declared to be a first and prior lien upon all the moneys and assets in the hands of the Trustee, basing and predicating said claim for priority upon the Minneapolis contract, which is hereinbefore set forth (7).

Without undertaking at this time to specify the various incidents upon which this statement is based, the record discloses that little, if anything, was done by the Mechanics Loan & Trust Company, or anyone in its behalf, with respect to the matters and things required of that concern in and by the said agreement.

Further, that numerous other creditors of the Stack-Gibbs Company who had not signed the Minneapolis contract, had claims which, of necessity, could not be subordinated to the claim of the Mechanics Loan & Trust Company. Perceiving these things and the difficulties encountered by the fact that the Mechanics Loan & Trust Company loaned no moneys to the Stack-Gibbs Company under the terms of the Minneapolis contract

or otherwise, the Exchange National Bank filed a petition concurring in the petition of the Mechanics Loan & Trust Company, which said petition of the Exchange National Bank prayed, among other things "that the claim of said Mechanics Loan & Trust Company hereinbefore filed in said cause for the sum of $101,162.91 be allowed to the Mechanics Loan & Trust Company, and that it have a preference as prayed for therein and that all dividends therein be paid to the Mechanics Loan & Trust Company," which said petition is set forth at large at page 22 of the record, and proceeds upon the theory, as will be observed, that the Exchange National Bank loaned and advanced the said $100,000.00 to the said Stack-Gibbs Lumber Company at the special instance and request of the several parties executing the Minneapolis contract but for which said contract the Exchange National Bank would not have advanced said moneys at the request of the Mechanics Loan & Trust Company and the other parties signing said contract—that the notes given to the Exchange National Bank have been delivered to the Mechanics Loan & Trust Company for the purpose of filing and establishing its claim for the benefit of and on behalf of the Exchange National Bank, and asks that in the event it is determined that the Mechanics Loan & Trust Company for the benefit of the Exchange National

Bank is not awarded a lien upon all of the assets of the Stack-Gibbs Lumber Company in the hands of the Trustees, *that the dividends of the various creditors who executed the Minneapolis contract be directed by the court to be paid to the bank to the extent of its claim of* $100,000.00 (22).

Considerable testimony was taken on behalf of all parties to the controversy, as the result of which an order was entered by the Referee which, while denied the right of either of the Exchange National Bank or the Mechanics Loan & Trust Company to establish a lien upon all of the assets of the Stack-Gibbs Lumber Company, decreed that the Mechanics Loan & Trust Company *"be paid all dividends or moneys that may hereafter be determined by the court to be due and payable to the following persons* (naming the signers of the Minneapolis contract, including appellants) *until the full amount of* $101,162.91 *is paid;* said payment be made before any moneys whatsoever of said estate be paid in liquidation or satisfaction as dividends or otherwise, of any of the claims of the above named creditors and signers of said trust agreement or any of them; that is, that said sum be a first lien upon the dividends of said signing creditors until the same is fully paid" (64).

Further, that the petition of the Exchange Na-

tional Bank of Spokane, Washington, be and the same is hereby granted with this modification, to-wit, "that all sums hereinafter found to be due and payable to said Mechanics Loan & Trust Company shall be paid jointly with said Exchange National Bank of Spokane, Washington."

As hereinbefore stated, the order last quoted from is that which forms the basis of this appeal.

I.

The Court is met at the threshold of this case by the question of jurisdiction, and must, as we view it, determine whether the Federal Court sitting in Bankruptcy has the power to enter, over the protest and objection of those effected thereby, an order of the character of that appealed from.

It is our contention that while obviously the Court has the right to determine the extent and validity of the claim of the Mechanics Loan & Trust Company for a first and prior lien upon all of the assets of the Stack-Gibbs Company, that power having been extended by the Acts of Congress; that upon the determination by the Court of the fact that the Mechanics Loan & Trust Company did not, as by it prayed for, have a first and prior lien upon all of the assets of the Stack-Gibbs Company in the hands of the Trustee, that

then and at that instant it was stripped of any power or authority to go beyond that point and decide a question, not an incident to the bankruptcy proceedings which did not involve the marshalling and distribution of the assets of the bankrupt, but which, on the contrary, determined independent controverted facts arising between parties not to the bankruptcy proceedings and in which the Trustee was not involved, but which existed between parties then before the Court only incidentally for the purpose of protecting the estate against unwarranted claims for lien, who, by reason of the assumed exercise of authority on the part of the Referee, were deprived of the constitutional right of trial by jury.

This, we charge, was done and in this the authority of the Federal Court sitting in Bankruptcy was exceeded when the Referee ordered that the dividends which otherwise would be payable to the signers of the Minneapolis contract, including appellants, be paid to the Exchange National Bank and Mechanics Loan & Trust Company.

The Federal Court sitting in Bankruptcy is a court of limited jurisdiction.

See:

Taft vs. Century Savings Bank, 15 A. B. R. 597, 141 Fed. 396 (C. C. A., Ia.).

"The District Court as a court of bankruptcy is undoubtedly a court of limited jurisdiction."

Also:

Edelstein vs. United States, 149 Fed. 636 (C. C. A. 8th Circuit), page 638.

"It is true the District Court as a court of bankruptcy is one of limited jurisdiction—that is, limited in respect of the subjects over which we may exercise jurisdiction—but it is unlimited in respect of its power over proceedings in bankruptcy specifically made subject to its jurisdiction by Section 2 of the Act."

In re Columbia Real Estate Company, 101 Fed. 965, page 970.

(Decision by Judge Baker, now presiding Justice of the United States Court of Appeals for the Seventh Circuit—Appeal dismissed—112 Federal, 643.)

"It is true the Bankruptcy Court is one of limited jurisdiction * * *."

In re Billing, 145 Fed. 395, page 400.

"The District Court of the United States is a Court of limited but not inferior jurisdiction."

The only powers which it may assume to exercise are those specifically enumerated in the Acts of Congress or which may be inferred from the general provision found in the Act, Section 2, Subdivision 15, which is the grant of power "to make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of this Act."

Obviously the Court may determine, and in a summary manner, the rights of all claiming an interest in the property coming to the possession of the Trustee, as the Act provides (Section 2, Subdivision 7), that the Court shall "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

It is not necessary for us to base our contention upon the point that the Court exceeded its authority in entering the order directing the diversion of dividends otherwise payable to appellants, to the Exchange National Bank and Mechanics Loan & Trust Company purely upon reasoning, as several of the Federal Courts have passed upon this subject.

Judge McPherson, District Judge, sitting in the Eastern District of Pennsylvania in the case of

Re Girard Glazed Kid Company, 136 Fed. 511,

held that the Federal Court would not concern itself in a controversy between two contesting claimants over dividends to be declared by that Court.

Speaking of the conclusion reached by the Referee in the controversy, the Judge in his opinion says:

> "But I agree with his conclusion that the equities between Barbara Swartz and Clara Illingsworth cannot properly be adjusted in this proceeding by deducting from the dividend payable to the former a sum that will make good to the latter the amount which she would have received under the agreement of January 20, 1903, if her claim had not been wrongfully reduced on the bankrupt's books. This is a dispute that has nothing to do with the bankruptcy proceedings, nor with the ascertainment of the true amount of the claim. It is a controversy growing out of a transaction that took place between two persons before the petition was filed, and concerns a sum of money that came into Barbara Swartz's possession at that time, and has remained in her possession since. It is an independent controversy about the ownership of money that

is not a part of the fund for distribution, and this court cannot take jurisdiction of the dispute and decide it in the roundabout manner that has been suggested. If Barbara Swartz has the money in her possession that belongs to Clara Illingsworth, *ex aequo et bono,* the proper tribunal is open for an appropriate suit. To take other money from the former, and decree it to the latter in this proceeding would be to confuse two distinct and separate suits having nothing to do with each other. Of the action in bankruptcy the district court has jurisdiction; but it has no jurisdiction of a suit to recover from Barbara Swartz any excess of payments that she may have received under the agreement of January 20, 1903. Such a suit is not involved in the settlement of the bankrupt estate."

What is said with respect to the denial by the Federal Courts of the right to garnishee dividends in the hands of the Trustee in bankruptcy applies equally as well to the controversy before this Court.

The case of Re Hollander, 181 Fed. 1019, conceded without question the right of the Federal Court to pass upon claims for liens upon moneys in the possession of the Court, but points out the pitfall resulting from contests between those having

separate controversies over the dividends themselves. There it is said that—

> "Where there are two or more persons who claim to be entitled to a fund in the possession of the court, or who claim to have liens upon that fund, the court necessarily has jurisdiction to decide upon their relative claims and contentions. But where, as in this case, the petitioner neither claims title to nor specific lien upon the fund in question, and has not procured the appointment of a receiver, who has succeeded to the creditor's title, the court cannot be asked to suspend or deny the right of the creditor to receive his dividend. In re Kohlsaat, 14 Fed. Cas. 833. If it be clear, as above stated, that the court has no legal right to do what is asked, it is quite as certain that it would be very unfortunate, from a practical standpoint, if the rule of law were otherwise. If the specific relief asked for in this case could be granted, every person who had obtained a judgment, not only in a court of record, but before a justice of the peace, for any sum, however small, against any one who was entitled to a dividend in a bankruptcy case, could come into this court to obtain payment out of such dividend. He would likely, in many cases, be met by claims of

assignees, who would assert that the dividend has been assigned to them prior to the date of the recovery of the judgment. This court would be called upon to pass upon many cases of small importance, but likely to be bitterly contested and over which it was never contemplated it should have any jurisdiction."

The Hollander case, as cited, was approved by the Circuit Court of Appeals for the 7th Circuit.

In the case of In re American Electric Telephone Company, 211 Fed. 88, page 90, in a decision by Judge Kohlsaat, which, in denying right to garnishee, held:

"The main question here presented is whether or not it was error for the District Court to permit the introduction into this bankruptcy proceeding of an independent and entirely irrelevant matter. For respondent it is claimed that by analogy the law and practice relative to permitting suits against receivers is applicable to trustees in bankruptcy. If this be so, then the District Court has the power, in its legal discretion, to permit the garnishment of the trustee. Undoubtedly the bankruptcy court has power to permit suit against its trustee or receiver with reference to liens upon or title to specific property claimed by the

trustee. This, however, is not such a case. Here the respondent sought to create a lien. The effect is to inject into the bankruptcy proceedings a suit to enforce payment of a claim against a creditor of the bankrupt, a matter in which the trustee was not concerned and one neither covered nor contemplated by the Bankruptcy Act. Clause 2 of Sec. 47 of the Act of July 1, 1898, c. 541, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), requires the trustee to 'close up the estate as expeditiously as is compatible with the best interests of the parties in interest.' Clause 9 of said section directs the trustee to 'pay dividends within ten days after they are declared by the Referee.' It is apparent that any attempt to adjust the rights of a creditor of the bankrupt as against the right of one seeking to enforce a claim against the creditor's dividend must, when carried out to its logical result, place an additional burden upon the bankruptcy court and work a delay in the settlement of the estate. It is conceivable that garnishment proceedings may be prolonged for years, so that the court may be congested with unfinished business which in no way concerns the bankruptcy cases so remaining undisposed of, thus becoming an independent collection tribunal, whereas it was

the purpose of the act, as stated in Wood vs. Wilbert, 226 U. S. 384-387, 33 Sup. Ct. 125, 127, 57 L. Ed. 264, 'to secure an equality of distribution of the estate of the bankrupt among his creditors.' In the present case, the rights of Grant, as assignee of Lyman, are involved and would have to be adjusted.

As long ago as 1879 it was held (In re Cunningham, Fed. Cas. No. 3,478) that garnishment of a dividend in a bankruptcy cause could not be entertained; that it would work delay; that the court knew no law or usage which would justify the court in making an order directing the assignee (trustee) to pay the creditor's dividend to the party garnisheeing, as a matter of comity.

In re Kohlsaat, Fed. Cas. No. 7,918, the court refused to give leave to attach the dividend of a creditor of the bankrupt on the ground that it was 'no part of the province of this court to become the stakeholder for parties litigant in a state court.' 'Whereas, in this case,' says the court in Re Hollander (D. C.), 181 Fed. 1020, 'the petitioner neither claims title to nor specific lien upon the fund in question, and has not procured the appointment of a receiver, who has succeeded to the

creditor's title, the court cannot be asked to suspend or deny the right of the creditor to receive his dividend.'

The Circuit Court of Appeals for the Ninth Circuit, in Re Argonaut Shoe Co., 187 Fed. 784, 109 C. C. A. 632, held, in a case similar to the present, that 'the right to garnishee funds in *custodia legis* must depend upon express statutory authority,' and that 'the distribution of the assets of the bankrupt, therefore,' cannot be stayed or prevented by the process of a state court, the object of which is to withhold a dividend from a creditor entitled thereto for the security of a plaintiff pending litigation.''

That the reasoning set forth in the case just quoted from applies to the case at bar, will be fully observed when we point out to the Court, as we do here, the fact that practically a year has been consumed in the contest of the claim of the Exchange National Bank and the Mechanics Loan & Trust Company for the dividends which would otherwise be payable to appellants, during which, not only has the Federal Court sitting in bankruptcy been delayed in the administration of the affairs delegated to it by the Acts of Congress, but the prompt distribution of the assets of the

estate of the Stack-Gibbs Company has been thereby prolonged and delayed, all of which we respectfully contend is contrary to the intent and purpose for which the Bankruptcy Act was passed.

In addition to what we have said, we wish also to cite the case of Stires vs. First National Bank, 119 N. W. Rep. 258, in which it is held:

> "A contract between two creditors of a common debtor wherein one agrees that a debt owing to a third creditor may be preferred by the debtor, if purchased by the other contracting creditors, does not amount to an assignment of the first party's debt, nor of the dividends declared thereon in subsequent bankruptcy proceedings."

The question immediately arises upon the determination of the controversy presented by this record adversely to the Mechanics Loan & Trust Company and the Exchange National Bank in so far as their claim for a lien upon all of the assets of the bankrupt in the hands of the Trustee is concerned, and confirming title in the Trustee, may the claimants require, after having failed in the primary object and purpose of their controversy, the exercise of powers neither incidental to the authority bestowed by the Act nor germane to the principal

feature of the controversy in which they have been defeated?

As we prepare to submit this brief, our research convinces us more strongly that the order appealed from is the outgrowth of a situation never clearly defined, but which is more nearly, and we might add, more frequently, presented by a bill in equity which seeks relief upon some ground or another and which for want of equity or insufficient evidence, must be denied or dismissed, the complainant to save the life of his bill engrafts upon it a controversy which otherwise but for the pending proceeding, would be subject to independent proceeding either at law or in equity.

And the question arises, may life be instilled by the interjection of a controversy, the determination of which is not essential to the relief sought in the original proceeding, or which is necessary for determination by a different tribunal?

Many cases are found upon the subject, a few of which we wish to cite and to quote from.

In deciding that the Mechanics Loan & Trust Company and the Exchange National Bank were not entitled to a first and prior lien upon the assets in the hands of the Trustee, the Referee had necessarily to determine that as the Trustee stood in the position of a creditor armed with process, the

Minneapolis contract was as to the Trustee, null and void. Bearing this in mind we wish the Court to consider the case of

> Denny vs. McCown, 34 Oregon 47; 54 Pac. 954,

in which a bill had been filed to foreclose a mortgage, which because of defects, was held to be void, and therefore not subject to foreclosure. Upon the determination of this point, plaintiff asked that judgment might be entered for the amount of the indebtedness secured by the mortgage. Thereupon, the trial Court proceeded to enter judgment upon presentation to the Supreme Court of Oregon, that tribunal held in reversing the decree and dismissing the suit that:

> "The rule that a court of equity, obtaining jurisdiction of a cause for one purpose, will retain it until complete justice is administered, can have no application to the case at bar; for, the jurisdiction to foreclose the trust deed being dependent upon the existence of the lien, it could not be legally exercised, on account of the validity of the instrument, and, the plaintiff having a complete and adequate remedy at law upon the note, the court was

powerless to award a money judgment thereon."

Another Oregon case is found reported (Dodd vs. Home Mutual Insurance Company), 22 Oregon, 3, 28 Pac. 881, in which a bill for specific performance was filed seeking the delivery of a policy of insurance in which it was held that no agreement to deliver a policy had been shown. There the plaintiff had sought to retain the jurisdiction of the Court for the purpose of awarding damages, but in denying that right, the Supreme Court of Oregon held:

> "But the plaintiff contends that, having proceeded thus far with this inquiry, and having reached a conclusion adverse to him on the equitable aspects of this case, we ought to retain the case, and determine the questions of fact upon which the defendant's legal liability may be supposed to depend. There is a numerous class of cases where, if equity takes jurisdiction for one purpose, it will retain the cause for all purposes, and administer complete relief; but, having found against the plaintiff's equity that rule has no application. If we had found that the defendant agreed to issue the policy, and had refused, we might have decreed specific performance; and then

> we could, as incident to the equitable relief to which the plaintiff would have been entitled, have ascertained the amount of plaintiff's loss, and decreed that defendant pay the same. Insurance Co. v. Ryland, 69 Md. 437, 16 Atl. Rep. 109. But, where the equity entirely fails, we think it better to dismiss the suit, and leave the party to pursue such legal remedy, as he may be advised."

In the case of Wiggins vs. Columbian Fireproofing Company, 227 Pa. 511, 76 Atl. 742, in which to stay various suits at law, a bill was filed by building contractors against the estate upon which the building was erected, the tenants, patent holders and architect asking a determination of the party's respective liabilities and enjoining said suits at law against the builders, it was held that the bill should have been dismissed as against the tenants since the plaintiffs and the other defendants had no concern with the controversy between the tenants and the estate. That portion of the decision pertinent to the issues of this case is as follows:

> "The first of the appeals suggests many questions; but the only one which it is important to consider arises out of the complaint that the court below fell into error in assuming jurisdiction of the bill as to the appellants,

as they were thereby deprived of their right to trial by jury. The contention on the other side is that all of the matters in dispute were so interlaced that it was practically impossible, or certainly difficult and inconvenient, to dispose of them separately, and on that ground, and to avoid a multiplicity of suits, the bill should be sustained.

The plaintiff and the other defendants had no real concern with the points in dispute between these appellants and their landlords, and those questions in no way so intermingled with the questions in controversy between these other parties as to give any sufficient reason why they should be drawn out of their regular course at common law into this equity proceeding. There was no inadequacy in the remedy at law which had been invoked against the appellants, nor was there any great convenience to be served, or inconvenience to be avoided, by forcing their case into equity. The bill should have been dismissed as to these appellants."

The Supreme Court of Illinois in the case of Brauer vs. Laughlin, 235 Ill. 265, 85 N. E. 283, upon appeal from a decision in which a bill for specific performance of a contract had been filed

in which proceeding it was ultimately held that, although the allegations in the bill authorizing a court of equity to take jurisdiction of the case for the purpose of granting the relief prayed for, the evidence was insufficient to sustain the allegations of the bill, the Court found:

> "The rule is well understood that a party cannot resort to equity for relief when he has a complete and adequate remedy at law. This rule is not disputed by appellee, but it is contended that as the bill to which appellant filed an answer contained allegations which, if sustained, entitled complainant therein to equitable relief, the court properly retained the bill, and, notwithstanding the proof failed to sustain the allegations upon which complainant relied for equitable relief but did show that appellant was indebted to Sarah Eden for money borrowed, the court properly retained the bill and entered a decree in favor of the complainant therein, and against appellant, for the amount of money so found due, notwithstanding a recovery might have been had in an action at law. In Toledo, St. Louis and New Orleans Railroad Co. v. Railway Co., 208 Ill. 623, the court said (p. 632): 'While it is true that a court of equity which has jurisdiction of a cause by reason of the existence of

some ground of equitable jurisdiction, for the purpose of doing complete justice between the parties, may, in addition to the equitable relief, afford relief of a character which in the first instance is only obtainable in a suit at law, still, to authorize relief of the latter character, some special and substantial ground of equitable jurisdiction must be alleged in the bill and proved upon the hearing. Mere statements in a bill upon which the chancery jurisdiction might be maintained but which are not proved will not authorize a decree upon such parts of the bill as, if standing alone, would not give the court jurisdiction.' The Supreme Court of the United States said in Dowell vs. Mitchell, 105 U. S. 430: 'The rule is, that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out, cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice.'—citing authorities. In Carlson v. Koerner, 226 Ill. 15, this court said (p. 21): 'The mere allegation of irreparable injury, while it may be sufficient to give a court of equity jurisdiction upon the face of the bill, is not sufficient upon

the final hearing unless sustained by proof.' This rule is sustained also by 16 Cyc. 111, Tiernan v. Granger, 65 Ill. 351, and cases cited by the court in Toledo, St. Louis and New Orleans Railroad Co. v. Railway Co., *supra,* and which need not be again here cited. No reason appears, either from the proof or decree, why the remedy of Sarah Eden was not as complete and adequate in a proceeding at law as in a suit of equity.

The recovery here allowed is upon a purely legal demand, and if an action had been brought at law, either of the parties would have been to a jury on the trial. Courts will not permit parties to sue in chancery, and upon failure to establish any basis for equitable relief have the bill retained for the purpose of a recovery upon a purely legal demand. To allow this to be done would be to deprive the dependant of his constitutional right of trial by jury. We said in County of Cook v. Davis, 143 Ill. 151 (p. 154): 'Where a court of law is competent to afford an adequate and ample remedy, courts of equity will remit the parties to the courts of law, where the right of trial by jury is secured to them. In such cases either party has a right to demand that the matter of the defendant's liability be sub-

mitted to a jury according to the course of the common law, and unless some special and substantial ground of equity jurisdiction be alleged, and, if necessary, proved, such as that a lien exists for the money demand which can not be adequately enforced at law, or that discovery is necessary to a recovery by complainant, or other like equitable considerations affecting the adequacy of the remedy at law, courts of equity will decline to interfere. These principles are familiar to every lawyer, and have frequently received approval in this court —Taylor v. Turner, 87 Ill. 296; Victor Scale Co. vs. Shurtleff, 81 id. 313; Gore v. Kramer, 117 id. 176; Buzzard v. Houston, 119 U. S. 347; Russell v. Clark, 7 Cranch, 69.' We have held that a court of chancery has power, where any equitable conditions exist authorizing it, in order to do complete justice between the parties, to enforce legal as well as equitable rights, but the equitable conditions authorizing it depend upon the proof and not upon the bare allegations of the bill.

Sarah Eden having failed to prove any allegations of her bill which authorized a court of equity to take cognizance of it, the chancellor erred in retaining it for the purpose of enforcing purely legal rights.''

To the same effect is the case of Fulton vs. Fisher, 239 Mo. 116, 143 S. W. 438, page 443:

> "Suits in equity are proceedings in personam. Therefore, when the court lawfully acquires jurisdiction of the persons, it may adjudge their property rights regardless of where the property is situated. But it does not follow that, because the court has acquired lawful jurisdiction of the person for one purpose, it may, in that suit, hold him to answer for another matter. For example, Mr. Fulton, a resident of the State of Pennsylvania, is made a party defendant to the suit concerning certain coal lands in Ohio, in which suit he is interested only as a member of the syndicate or as a creditor of that syndicate. He comes from his home in Pennsylvania and enters his appearance, whether voluntarily or under stress of the order of publication it is immaterial, to defend his interest in that suit. Then advantage is taken of his appearance here to serve him with a copy of a so-called cross-bill that relates entirely to other matters involving large interests. Can it be said the court has thus acquired jurisdiction of him for that purpose? He appealed to the court for relief; but the court overruled his demurrer, and he found himself in a position

where he must either let the cross-pleader take judgment against him or answer, and so he answered. It does not clearly appear from the record whether Fulton was here in person or entered his appearance to Jones' suit by attorney; probably the latter, because, if he was here in person, it would perhaps have resulted in an independent suit against him, which would have a different aspect. There was no new suit instituted, no writ served. It was only an effort to tack on to Jones' suit another entirely different suit.

Here Fulton was unconditionally in court for all the purposes of the Jones suit, subject to its judgment, and entitled to its protection. His complaint now is, not that the court had not jurisdiction of his person, but that it used its jurisdiction to force him to answer in another suit. We hold that the court did not acquire jurisdiction of the subject of the West Virginia controversy by the means pursued, and that by answering the amended cross-bill Fulton did not give such jurisdiction.

The doctrine is also invoked that equity, having gained jurisdiction of a cause, will carry it on until complete justice is done either in law or in equity. But that doctrine does

not go so far as to say that a court of equity, having acquired jurisdiction of one cause of action, will extend its jurisdiction to embrace other subjects of litigation of different character and between different parties. The learned trial judge himself recognified that he had on his hands two entirely different suits, and therefore, when he sent the cause to a referee, he ordered that one suit should be tried first and nothing done in the other until the final report on the first. The report that came in in that case disposed of the whole of Jones' original suit, and that suit was then ready to progress to final hearing before the chancellor; but the plaintiff arrested that progress by dismissing his suit.

We hold that the dismissal of that case carried the amended and supplemental cross-bill and all pleadings relating thereto out of court."

In the case of Davis vs. City of Silverton, 47 Oregon, 171, 82 Pac. 16, his Honor Judge Wolverton, then Chief Justice, in reversing a decree of the Circuit Court and dismissing the bill of complaint filed for the purpose of enjoining the collection of a special assessment and collecting damages, said:

"Plaintiff, however, asks for damages for

the encroachment upon her premises as a part of her relief here. Being recoverable at law, it could have no place in an equitable proceeding, unless germane to the suit or growing out of the proceedings complained of. It is a familiar rule that, if equity acquires jurisdiction for one purpose it will retain the cause for all purposes, and administer complete relief. The rule, however, does not operate to give the court jurisdiction to administer relief at law where the equity fails. Love v. Merrill, 19 Ore. 545, 24 Ore. 916; Dodd v. Insurance Company, 22 Ore. 3, 28 Ore. 881, 29 Pac. 3; Whelan v. McMahan (just decided), *infra*. Such is the precise condition here. Plaintiff has failed in her main purpose—that of enjoining the collection of the assessment. The proceedings for the improvement being regular, and plaintiff having so failed, her equitable remedy is extinct. She might have had her relief to enjoin an encroachment and trespass while in the act, if the city was guilty of the like; but, the act having been accomplished, her remedy is to repossess herself of the property and sue for damages. For this she must be remitted to her action at law."

The Circuit Court of Appeals for the Eighth Circuit in the case of Lewis Publishing Company

vs. Wyman, *et al.,* 182 Fed. 13, recognizes the same principle laid down in the cases quoted from and in that decision (page 18) quoted from the case of Mitchell vs. Dowell in the Supreme Court of the United States, which case is cited also by the Supreme Court of Illinois in the case hereinbefore referred to.

> "True, when involved in a suit of which a court of equity has jurisdiction, matters of legal cognizance may be disposed of if incidental to the equitable relief that is granted. But it appears here that at the instance of complainant the case it had in court assumed such a phase that no injunction or other equitable relief could be granted. It is as though complainant had amended its bill by withdrawing all averments calling for the interposition of a court of equity. Under such circumstances a court should not retain the case for purposes purely legal. In Mitchell v. Dowell, 105 U. S. 430, 26 L. Ed. 1142, the court said:
>
> 'The rule is that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice.' "

In the case of Linden Investment Company vs. Honstain Brothers Company, 221 Fed. 178, an appeal had been taken from a decree granting relief upon a bill for Mechanics' Lien which, while not established for want of equity, had sought an accounting for moneys due. The Circuit Court of Appeals held:

> "Counsel for the plaintiff argue that the court below should determine and give judgment upon the claim of the plaintiff for the amount it alleges the Investment Company owes it on account of the construction of the Mowbray elevator. But the right to the establishment and foreclosure of the alleged mechanics' lien upon this elevator is the only ground of equity jurisdiction invoked by the second cause of action which is independent of the first and relates solely to the mechanics' lien upon that elevator. And as that ground does not exist there is no jurisdiction in equity of that cause of action remaining. The plaintiff's claim to recover the amount it asserts the defendant promised to pay it for the erection of the Mowbray elevator is a purely legal cause of action, upon which the defendant has the right to a trial by jury under the Acts of Congress (Revised Statutes, 723), and when upon the hear-

ing of a suit in equity the right to all equitable relief upon an independent cause of action entirely fails the court of equity is without jurisdiction to retain the cause and try issues at law and grant incidental or other relief thereon. Mitchell v. Dowell, 105 U. S. 430, 432, 26 L. Ed. 1142; Russell v. Charle's Executors, 7 Cranch, 69, 3 L. Ed. 271; Kramer v. Cohn, 119 U. S. 355, 357, 7 Sup. Ct. 277, 30 L. Ed. 439; Alger v. Anderson (C. C.), 92 Fed. 696, 710; Lewis Publishing Co. v. Wyman (C. C.), 168 Fed. 756, 762."

A most interesting decision has been handed down by the Circuit Court of Appeals for the Fourth Circuit in the case of Henry vs. Henderson, 145 Fed. 316, in which a petition was filed in bankruptcy by one seeking to enjoin the trustee in bankruptcy from executing a deed of sale to one who had purchased real estate at a bankruptcy sale on the ground that he, rather than the purchaser, was entitled to the deed. It was held, after reciting the facts, that:

"Thus it will be seen that this is a controversy between two parties, neither of whom was a party to the proceeding in bankruptcy under which the property was sold. It is a controversy which does not in the slightest

degree affect the creditors of J. B. Henderson, the bankrupt, nor is the trustee in any wise affected. Stripped of all extraneous matters, it appears to be an effort on the part of Henderson to compel specific performance of a contract relating to the sale of land. There is no provision which gives the bankruptcy court jurisdiction to hear and determine controversies of this kind. The object of the bankruptcy law is to afford the means by which the creditors of the bankrupt may secure an equitable and fair distribution of the bankrupt's property, etc., and the act contemplates that any collateral questions growing out of the settlement of the bankrupt's estate may be heard and determined in that court. But here we have parties who are contending about a matter which is in no way related to or connected with the affairs of the bankrupt. Under these circumstances, we fail to understand the theory on which this proceeding was instituted.

We are of the opinion that the court of bankruptcy has no jurisdiction of suits of this character, but, even if this were an effort on the part of the respondent to bring his suit in the Circuit Court of the United States, that court would be without jurisdiction inasmuch

as it appears from the record that both parties are citizens and residents of the State of West Virginia. We are therefore of the opinion that the District Court was without jurisdiction to hear and determine the controversy between the petitioner and respondent. The case will be remanded, with instructions to dismiss this suit."

Although the record in the case at bar clearly discloses the ample objections made by appellants to the exercise of jurisdiction by the referee to enter the order complained of and for this reason we do not consider the matter of paramount importance, we wish to point out that the Circuit Court of Appeals in the case last quoted from held that though neither party objected to the jurisdiction of the Federal Court at the trial, this was insufficient to justify the Court in assuming jurisdiction to determine the controversy unless the record affirmatively showed that the case presented was within the class of cases of which jurisdiction had been conferred by Congress upon the Federal Court.

From the cases which we have cited upon this subject, we respectfully insist that not only the Referee lacked jurisdiction to award the dividends

upon the claims of appellants to the Exchange National Bank and the Mechanics Loan & Trust Company because of the fact that Congress has not endowed the Federal Court sitting in bankruptcy with a power to pass upon matters of this character which are separate independent controversies between parties with whom the bankruptcy court is not concerned, but that notwithstanding this inherent want of jurisdictional power, the controversy is one which is beside the question the Referee was in the first instance called to pass upon and is in fact a controversy which should be determined by a court of law, and is not an incident to the primary relief prayed for by the Mechanics Loan & Trust Company, and for the reason stated, the order of the District Court, if for no other, should be reversed.

We cannot refrain at this point from calling the attention of the Court to what, in our judgment, appears to have been an oversight on the part of Judge Dietrich in that portion of his opinion, which reads as follows:

> "Neither the creditors referred to in this brief nor the Trustee is complaining of the order under review, by which the Trustee was recognized as having a sort of equitable lien upon the dividends to which the signatory creditors may become entitled."

We do not feel that we should be criticised under the circumstances in advising the Court, as a matter of fact, independent of the record, that the individual who prepares this brief personally argued the matter before Judge Dietrich, and dwelled at length in that argument upon the very question which is discussed in the preceding paragraphs, *viz.,* that the Federal Court sitting in bankruptcy may not, because of inherent want of jurisdiction, declare in favor of another, an equitable lien upon any of the dividends payable to those creditors who file their claims in the usual course, and we say this with every mental assurance, that those gentlemen who will reply to this brief, recognizing what we have stated to be true, will not charge us with reciting facts outside the record, when we state this to be a fact.

In addition to what we have just said, we might, by way of suggesting diminution of record, produce, we assume, for observation by this Court, the very lengthy briefs submitted to Judge Dietrich on behalf of the respective parties to this controversy in which the precise point is raised and extensively discussed.

That it is not necessary for us, however, to go beyond the record with respect to this matter, we wish to point out to this Court the petition for

review from the order of the Referee upon which, together with the certificate for review, the District Judge decided the matter presented, and to quote here paragraph "a" of said petition, which reads as follows (Rec., p. 70):

> "Said Referee had no jurisdiction to pass upon the claim of a preference or lien by the Mechanics Loan & Trust Company and by the Exchange National Bank, or by either of them, to the dividends due or which should be found to be due and declared to these petitioners or to either of them or to determine any rights whatsoever to the dividends to be declared herein as between the said claimant and these said petitioners."

Also paragraph "m" of said petition, which reads as follows (Rec., p. 72):

> "Said Referee committed error in ordering and adjudging that the Mechanics Loan & Trust Company be paid all dividends or moneys that may hereafter be determined by the court to be due and payable to the following persons or corporations signing said Lincoln Trust agreement, to-wit: Merrill, Cox & Company, Fort Dearborn National Bank, I. F. Searle, First National Bank of Nebraska, Shoshone Lumber Company, Idaho Timber

Company, S. H. Hess, J. K. Stack, Genevieve H. Tolerton and Minnie A. Gibbs, until the full amount of $101,162.91 was paid, and in ordering and adjudging that said sum be declared to be a first lien upon the dividends of said respective parties."

It is not for us to explain the reason for the insertion by his Honor Judge Dietrich in his decision of that portion quoted, for that not knowing we cannot do. We must assume, however, in justification of our position, that the District Court did not attach the same importance to the question under discussion as appellants feel the matter should be given.

II.

We wish to call the attention of the Court to that provision of the Minneapolis contract which appears at paragraph 10 thereof, and which reads as follows:

"The Trustee shall advance such sum of money as it deem necessary to meet the payroll of the Lumber Company and the Mill Company, and to discharge the claims of the creditors who do not execute this instrument as it may deem necessary or requisite to protect the trust estate, not to exceed, however, the sum of One Hundred Thousand ($100,000.00)

> Dollars, and the Trustee shall have a first and preference claim upon said trust estate for the amount of such advancement."

Inasmuch as the Mechanics Loan & Trust Company was designated as Trustee, clearly the provision quoted from referred to that concern and to no other, and it now is and always has been the contention of the appellants that the Exchange National Bank cannot lawfully, for the purpose of securing the benefit of the security pledged, create in its favor a lien either upon the assets in the hands of the Trustee or upon the dividends payable to appellants by calling upon the Court to so construe that contract as to read into the same the name of "Exchange National Bank" in lieu of the Mechanics Loan & Trust Company, and independent of the testimony of Mr. Coman, we do not believe that counsel for the Exchange National Bank would so contend.

The theory upon which the right of the Exchange National Bank to be substituted as beneficiary under the so-called trust agreement is predicated, is found exclusively in the statement of Mr. Coman reported by him to have been made at the meeting of the creditors at Minneapolis, at or about the time the so-called trust agreement was

prepared. That statement is as follows (Rec., page 277):

> "He (referring to Mr. Fletcher, Vice President of the Fort Dearborn National Bank) wanted to know what the responsibility of this trustee was, and I stated that while the capital was only Ten Thousand ($10,000) Dollars, that through an arrangement with the bank (Exchange National Bank) we could get the money to carry out the terms of this contract."

(The record not only shows an objection to the question calling for the testimony quoted, but in addition thereto a motion to strike, both of which are most ample in their specifications.) (241 to 245-276.)

Therein and upon this testimony lies the right, if any, of the Exchange National Bank to stand in the shoes of the Mechanics Loan & Trust Company.

That the Referee erred in admitting the evidence complained of, we have little doubt. And our convictions on this subject are, we believe, fully sustained by a multitude of authorities, only a few of which we deem necessary to quote from.

> American National Bank vs. Harlan, 89 Md. 675, 43 Atl. 756,

reports a suit instituted in the trial Court by the Receivers of the Consumers Meat Company to compel a transfer of a certain leasehold standing in the name of one Schott, as Trustee, alleged to be the property of the Consumers Meat Company.

The appellant, American National Bank, a defendant by answer to the petition, set up the defense that the property was held by Schott as Trustee to secure the American National Bank an indebtedness due it by the Consumers Meat Company and not as Trustee of the latter company.

It appears from the trust deed that the property described was conveyed to "Simon P. Schott, Trustee for the Consumers Meat Company of New Jersey, a body corporate of the second part."

It was sought by oral evidence to show that Schott was in reality the Trustee for the American National Bank, and that it was so understood. Testimony to this effect was excluded by the trial Court, whereupon the American National Bank, who claimed error therefor, appealed. The Court in passing upon the subject held:

> "Nor can such a trust be created for the benefit of a third person, and to defeat a complainant's equity, by an answer alleging declarations or intentions at variance with the expressed intention of a deed. Now, in the

case before us the appellant not only seeks by parol proof to vary and contradict the terms of the deeds, but to substitute itself, an unnamed *cestui que* trust, for the one named in the deed. Mr. Simon P. Schott, the trustee, testified in part to this effect: 'I became the trustee of this property because it was a condition precedent to the continuing of the indebtedness of the said Consumers Meat Company that they should make these deeds to me as trustee, for the purpose of securing the bank against any loss on account of its indebtedness to the bank at that time, or that may occur thereafter; that is, after the making of the deeds the property was to be held as collateral property for the indebtedness of the Consumers Meat Company to the American National Bank.' This evidence is clearly at variance with the expressed intention in the deeds, and was inadmissible for the purpose offered."

In the case of Evans vs. Duncan, 82 Ia. 401, 48 N. W. 922, it was sought by parole evidence to show that the name of a grantee named in a deed was inserted merely as security to him for money advanced by the real purchaser with which to pay for the real estate deeded, the Court held:

> "The deed is absolute and unlimited, both as to guarantee and covenants of the warranty. There is no question but that the general rule is that the terms of a written contract cannot be changed or varied by any prior or contemporaneous or parole agreements."

A similar situation arose in California as reported in the case of Young America Engine Company vs. City of Sacramento, 47 Calif. 594. Inasmuch as the syllabus of the case is the meat of the entire decision, we content ourselves by quoting therefrom as follows:

> "Parol Evidence in Case of Deed.—In any action by a *cestui que* trust against a trustee to enforce the trust, by compelling a conveyance of the legal title to the *cestui que* truth, parol evidence, in the absence of fraud or mistake in making the deed, will not be received on behalf of the trustee, to contradict the language of the deed, and show that the trustee named in the deed, and not the *cestui que* trust, was the beneficiary."

We wish also to cite the case of the Union National Bank vs. International Bank, 22 Ill. App. 652. The case was a foreclosure proceeding.

The appellees claimed under and sought the fore-

closure of a trust deed in the nature of a mortgage made by one Walker to one Rosenthal as Trustee, conveying a parcel of real estate to secure to several appellees an indebtedness of Walker to them, the contest being as to the amount legally due under the trust deed between the Union National Bank and the heirs at law of one Coolbaugh, deceased.

Their relation to the case arose out of a second trust deed by which Walker conveyed to Coolbaugh, as Trustee, the same real estate. The condition expressed in the second trust deed was in these words:

> "This conveyance is made to secure any and all indebtedness of Samuel J. Walker as maker or endorser of any and all notes, drafts or acceptances held by the Union National Bank or negotiated through said W. F. Coolbaugh or any or all renewals of the same or any or all paper that said Walker may hereafter sell to said bank or negotiate through said Coolbaugh."

At the time of Coolbaugh's death, Walker owed him Twenty-two Thousand ($22,000.00) Dollars and was also indebted to the Union National Bank in excess of Two Hundred Thousand ($200,000.00)

Dollars. The pertinent portion of the decision is as follows (page 655):

> "Counsel for appellants offered as evidence the oral declarations and deposition of said Walker to the effect and as tending to prove that at the time of the making of the trust deed to Coolbaugh, it was verbally agreed between him and Walker that it should be held as security for any notes or money due by Walker to Coolbaugh individually as well as to the bank. Upon objection of appellee's counsel, the court excluded the evidence."

After quoting from authorities, the Court held further:

> "The terms of a mortgage cannot be valid by any verbal agreement or understanding of the parties or their acts or conversations prior to or at the time of the execution of it."
>
> (1 Jones on Mortgage, Sec. 96.)
>
> "We are of the opinion that the evidence offered was incompetent. The parties offering it not being strangers and it would have been to alter or vary the condition by parol."

Upon appeal, the decision of the Appellate Court was sustained in the case of the Union National Bank vs. International Bank, 123 Ill. 510.

In the case of Newberry Land Co. vs. Newberry, 95 Virginia, 119; 27th Southeastern, 899, a corporation not named in a deed sought by parole evidence to show that it rather than the one named therein as grantee was the real beneficiary under the transaction; that it, in its own name, might enforce a covenant therein contained. The Court said:

> "The pleader, evidently well aware of the difficulty that confronted the plaintiff in maintaining a suit in its own name and right, sought to obviate it in drawing the declaration by the averment of extrinsic facts. We thus find it averred in the declaration that 'the covenants, promises, and agreements of the parties to the said written contract were made and entered into for the purpose of being continued until after the plaintiff became and was chartered, and that when the plaintiff corporation became and was chartered, that the said contract in writing, with all the covenants, promises, and agreements, should become the absolute property of the said corporation, by operation of said written contract itself'; and that, 'from the time it became a chartered corporation, * * * all the covenants, stipulations, and agreements in the said contract in writing which were made for the plaintiff's

benefit, or for the benefit of the parties of the first part thereto, or pertaining to them, or either of them, were, by operation of said contract in writing, as well as by the acts of all parties thereto themselves, transferred to and vested in the plaintiff corporation, and the plaintiff is entitled to all the rights and benefits of such covenants, stipulations, and agreements, and that it is now the sole owner of such covenants, stipulations, and agreements in said contract in writing, with the right to enforce them against the defendant.' "

Deciding the law applicable to the case, the Court said:

"The extrinsic facts, so averred, set up a distinct and contemporaneous parol agreement, tending to vary and contradict the contract on which the action is founded, which testimony would be inadmissible to prove, and upon which the action of covenant would not lie. Their averment in the declaration is an adroit and ingenious attempt to enable the plaintiff to maintain, by means of a collateral parol agreement, the action of covenant upon a sealed contract, to which it was not a party, and which does not show upon its face that it was made for the sole benefit of the plaintiff. It

is plain that this cannot be done."

III.

That the Exchange National Bank is a mere volunteer and not entitled to be subrogated to the security held by the Mechanics Loan & Trust Company is fully established and borne out by the authorities.

The Court will bear in mind that of the total amount of indebtedness claimed to be due by the Mechanics Loan & Trust Company and of the Exchange National Bank, $90,000.00 is represented by notes, executed by the Stack-Gibbs Company, made payable to the Mechanics Loan & Trust Company and by it endorsed *without recourse* to the Exchange National Bank, together with notes aggregating $10,000.00, executed by the Stack-Gibbs Company, *in which the Exchange National Bank appeared as payee.* It will also be borne in mind that no money or other thing of value was at any time ever paid on account of these notes by or to the Mechanics Loan & Trust Company (263). Upon the delivery of the notes by the officers of the Stack-Gibbs Company to the Mechanics Loan & Trust Company the notes were delivered immediately to the Exchange National Bank, which concern thereupon credited the account of the Stack-Gibbs Company with the proceeds of the notes,

after allowing discount charges. The Exchange National Bank kept no account with the Mechanics Loan & Trust Company with reference to these transactions, and for all intents and purposes the only parties concerned in the transaction there developed were the Stack-Gibbs Company and the Exchange National Bank. Having endorsed the notes without recourse, the Mechanics Loan & Trust Company has no further interest in the transaction, it being charged with no liability, having been released therefrom by reason of its endorsement, and having no obligation to perform, it having advanced no money. The notes in evidence, and all of them, were at the time they were discounted, ever since have been, and still are, the property of the Exchange National Bank. In addition to what we have stated, there was offered and received in evidence a receipt given by the law firm of Post, Russell, Carey and Higgins, who appeared as counsel for appellees, to the Exchange National Bank for the notes in question, dated in December, 1916, six months after the bankruptcy. Under these circumstances what is the position of the Exchange National Bank relative to its claiming any benefit or advantage under the Minneapolis contract, which has been otherwise referred to as the so-called trust agreement? It is our contention that the Exchange National Bank was

neither more nor less than a volunteer, loaning its money to the Stack-Gibbs Company and taking the notes of the Stack-Gibbs Company therefor, and under the authorities it cannot invoke the principle of exoneration through subrogation to the rights and securities which the Mechanics Loan & Trust Company might have had it, rather than the Exchange National Bank, had advanced the money. We wish to call the attention of the Court to some of the cases upon this subject.

In the case of Aetna Life Insurance Company vs. Middleport, 124 U. S. 534; 31st Lawyers' Edition, 537, it appeared that the plaintiff was the owner of fifteen bonds issued by the town of Middleport and delivered to the Chicago, Danville & Vincennes Railroad Company. The bonds were payable to bearer and were bought of the railroad company by the complainant, who paid value for them. Liability for payment was denied upon the ground that the proceedings which authorized the issuance and delivery of the bonds were void, perceiving which the life insurance company proceeded upon the theory of subrogation to the rights of the railroad company, which independent of the bonds, had at the time of the receipt of the bonds, a claim against the City of Middleport for the indebtedness which the bonds represented. The Supreme Court passing upon the subject in which

is probably the leading case in this country, used the following language (italics by counsel):

> "But we regard the primary question, whether the complainant is entitled to be substituted to the rights of the railroad company after buying the bonds of the township, a much more important question, and are unanimously of opinion that the transaction does not authorize such subrogation.
>
> "The bonds in question in this suit were delivered by the agents of the town of Middleport to the railroad company, and by that company sold in open market as negotiable instruments to the complainant in this action. There was no indorsement, nor is there any allegation in the bill that there was any express agreement that the sale of these bonds carried with them any obligation which the company might have had to enforce the appropriation voted by the town. Notwithstanding the averment in the bill that the intent of complainant in purchasing said bonds, and paying its money therefor, was to acquire such rights of subrogation, it cannot be received as any sufficient allegation that there was a valid contract to that effect. On the contrary, the bill fairly presents the idea that by reason of the facts of the sale the complainant was in equity

subrogated to said rights, and entitled to enforce the same against the town of Middleport.

"The argument of the learned counsel in the case is based entirely upon the right of the complainant to be subrogated to the rights of the railroad company by virtue of the principles of equity and justice. He does not set up any claim of an express contract for such subrogation. He says:

" 'The equity alleged in the plaintiff's bill is, as I have said, the equity of subrogation. Before proceeding to call the attention of the court to the facts from which this equity arises, it may be useful to advert to the instances in which the right of subrogation exists, and to the principles on which it rests.'

"He founds his argument entirely upon the proposition, that when the complainant purchased these bonds he thereby paid the debt of the town of Middleport to the railroad company, as voted by it, and that because it paid this money to that company on bonds which are void, it should be subrogated to the right of the company against the town.

"The authorities on which he relies are all cases in which the party subrogated has actually paid a debt of one party due to another,

and claims the right to any security which the payee in that transaction had against the original debtor. But there is no payment in the case before us of any debt of the town. The purpose of the purchase, as well as the sale of these bonds, and what the parties supposed they had effected by it, was not the payment of that debt, but the sale and transfer of a debt of the town from one party to another, which debt was evidenced by the bonds that were thus transferred. Neither party had any idea of extinguishing by this transaction the debt of the town. It was very clear that it was a debt yet to be paid, and the discount and interest on the bonds was the consideration which induced the complainant to buy them.

"The language of this court in Otis *et al.* v. Cullum, Receiver, 92 U. S. 447, is very apt, and expresses precisely what was done in this case. In that case Otis & Company were the purchasers of bonds of the city of Topeka from the First National Bank of that place. These bonds were afterwards held by this court to be void for want of authority, just as in the case before us. A suit was brought against the bank, which had failed and was in the hands of a receiver, to recover back the money

paid to it for the bonds. After referring to the decision of Lamber v. Heath, 15 Meeson & Welsby, 486, this court said:

"'Here, also, the plaintiffs in error got exactly what they intended to buy, and did buy. They took no guaranty. They are seeking to recover, as it were, upon one, while none exists. They are not clothed with the rights which such a stipulation would have given them. Not having taken it, they cannot have the benefit of it. The bank cannot be charged with a liability which it did not assume. Such securities throng the channels of commerce, which they are made to seek, and where they find their market. They pass from hand to hand like bank notes. The seller is liable *ex delicto* for bad faith; and *ex contractu* there is an implied warranty on his part that they belong to him, and that they are not forgeries. Where there is no express stipulation, there is no liability beyond this. *If the buyer desires special protection, he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken, he cannot occupy the vantage ground upon which it would have placed him.*' (P. 449.)

"Nor can this case be sustained upon the

principle laid down in this court in Louisiana v. Wood, 102 U. S. 294. That was a case in which the city of Louisiana, having a right by its charter to borrow money, had issued bonds and placed them on the market for the purpose. These bonds were negotiated by the agents of the city, and the money received for their sale went directly into its treasury. It was afterwards held that they were invalid for want of being registered. Afterwards the parties who had bought these bonds brought suit against the city for the sum they had paid, on the ground that the city had received their money without any consideration, and was bound *ex aequo et bono* to pay it back. The court said:

"'The only contract actually entered into is the law implies from what was done, to-wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied.'

"In the present case there was no borrowing of money. There was nothing which pretended to take that form. *No money of the*

complainant ever went into the treasury of the town of Middleport; that municipality never received any money in that transaction. It did not sell the bonds, either to complainant or anybody else. It simply delivered bonds, which it had no authority to issue, to the railroad company, and that corporation accepted them in satisfaction of the donation by way of taxation which had been voted in aid of the construction of its road.

"The whole transaction of the execution and delivery of these bonds was utterly void, because there was no authority in the town to borrow money or to execute bonds for the payment of the sum voted to the railroad company. They conferred no right upon anybody, and of course the transaction by which they were passed by that company to complainant could create no obligation, legal or implied, on the part of the town to pay that sum to any holder of these bonds.

"Litchfield v. Ballou, 114 U. S. 190, sustains this view of the subject. That town had issued bonds for the purpose of aiding in the construction of a system of waterworks. In that case, as in Louisiana v. Wood, the bonds were so far in excess of the authority

of the town to create a debt that they were held by this court to be void in the case of Buchanan v. Litchfield, 102 U. S. 278. After this decision, Ballou, another holder of the bonds, brought a suit in equity upon the ground that, though the bonds were void, the town was liable to him for the money which he had paid in their purchase. This court held that there was no equity in the bill on the ground that, if the plaintiff had any right of action against the city for money had and received, it was an action at law, and equity had no jurisdiction. It was also attempted in that case to establish the proposition, that, the money of the plaintiffs having been used in the construction of the waterworks, there was an equitable lien in favor of the plaintiffs on those works for the sum advanced. This was also denied by the court.

"One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity, to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original

creditor; that, being forced under such circumstances to pay off the debt of a creditor who had some superior lien or right to his own, he could, for that reason be subrogated to such rights as the creditor, whose debt he had paid, had against the original debtor. As we have already said, the plaintiff in this case paid no debt. *It bought certain bonds of the railroad company at such discount as was agreed upon between the parties, and took them for the money agreed to be paid therefor.*

"But even if the case here could be supposed to come within the rule which requires the payment of a debt in order that a party may be subrogated to the rights of the person to whom the debt was paid, the payment in this case was a voluntary interference of the Aetna Company in the transaction. It had no claim against the town of Middleport. It had no interest at hazard which required it to pay this debt. If it had stood off and let the railroad company and the town work out their own relations to each other it could have suffered no harm and no loss. There was no obligation on account of which, or reason why, the complainant should have connected itself in any way with this transaction, or have paid

this money, except the ordinary desire to make a profit in the purchase of bonds. The fact that the bonds were void, whatever right it may have given against the railroad company, gave it no right to proceed upon another contract and another obligation of the town to the railroad company.

"These propositions are very clearly stated in a useful monogram on the Law of Subrogation, by Henry N. Sheldon, and are well established by the authorities which he cites. The doctrine of subrogation is derived from the civil law, and 'it is said to be a legal fiction, by force of which an obligation extinguished by a payment made by a third person is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies, and securities of another. * * * It takes place for the benefit of a person who, being himself a creditor, pays another creditor whose debt is preferred to his by reason of privileges or mortgages, being obliged to make the payment, either as standing in the situation of a surety, or that he may remove a prior incumbrance from the property on which he relies to secure his payment. Subrogation, as a matter of right, independently of agreement,

takes place only for the benefit of insurers; or of one who, being himself a creditor, has satisfied the lien of a prior creditor; or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased; or of a co-obligor or surety who has paid the debt which ought, in whole or in part, to have been met by another.' Sheldon on Subrogation, Secs. 2, 3.

"In Sec. 240 it is said: *'The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so, for the preservation of any rights or property of his own.'*

"This is sustained by a reference to the cases of Shinn v. Budd, 14 N. J. Eq. (1 McCarter) 234; Sanford v. McLean, 3 Paige, 117; Hoover v. Epler, 52 Penn. St. 522.

"In Gadsden v. Brown, Speer's Eq. (So. Car.) 37, 41, Chancellor Johnson says: 'The doctrine of subrogation is a pure unmixed equity, having its foundation in the principles of natural justice, and from its very nature

never could have been intended for the relief of those who were in any condition in which they were at liberty to elect whether they would or would not be bound; and, as far as I have been able to learn its history, it never has been so applied. If one with the perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound who could not but choose to abide the penalty.'

"This is perhaps as clear a statement of the doctrine on this subject as is to be found anywhere.

"Chancellor Walworth, in the case of Sanford v. McLean, 3 Paige, 122, said: 'It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect. In other cases the demand of a creditor which is paid with the

money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished.'

"In Memphis & Little Rock Railroad v. Dow, 120 U. S. 287, this court said: 'The right of subrogation is not founded on contract. It is a creation of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice, and is independent of any contractual relations between the parties.'

"In the case of Shinn v. Budd, 14 N. J. Eq. (1 McCarter) 234, the New Jersey Chancellor said (pp. 236-237):

" 'Subrogation as a matter of right, as it exists in the civil law, from which the term has been borrowed and adopted in our own, is never applied in aid of a mere volunteer. Legal substitutes into the rights of a creditor, for the benefit of a third person, takes place only for his benefit who, being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser who extinguishes the encumbrances upon his estate, or of a co-obligor or surety who discharges the debt, or of an heir who pays the debts of the succession. Code Napoleon, book 3, tit.

3, art. 1251; Civil Code of Louisiana, art. 2157; 1 Pothier on Oblig., part 3, c. 1, art. 6, Sec. 2. 'We are ignorant,' says the Supreme Court of Louisiana, 'of any law which gives to the party who furnishes money for the payment of a debt the rights of the creditor who is thus paid. The legal claim alone belongs not to all who pay a debt, but to him who, being bound for it, discharges it.' Nolte & Co. v. Their Creditors, 9 Martin, 602; Curtis v. Kitchen, 8 Martin, 706; Cox v. Baldwin, 1 Miller's Louis R. 147. The principle of legal substitution, as adopted and applied in our system of equity, has, it is believed, been rigidly restrained within these limits.'

"The cases here referred to as having been decided in the Supreme Court of Louisiana are especially applicable, as the code of that State is in the main founded on the civil law from which this right of subrogation has been adopted by the chancery courts of this country. The latest case upon this subject is one from the appellate court of the State of Illinois—Suppiger v. Garrels, 20 Bradwell App. Ill. 625, the substance of which is thus stated in the syllabus:

" 'Subrogation in equity is confined to the

relation of principal and surety and guarantors, to cases where a person to protect his own junior lien is compelled to remove one which is superior, and to cases of insurance. * * * Any one who is under no legal obligation or liability to pay the debt is a stranger, and, if he pays the debt, a mere volunteer.'

"No case to the contrary has been shown by the researches of plaintiff in error, nor have we been able to find anything contravening these principles in our investigation of the subject. They are conclusive against the claim of the complainant here, who in this instance is a mere volunteer, who paid nobody's debt, who bought negotiable bonds in open market without anybody's endorsement, and as a matter of business. The complainant company has, therefore, no right to the subrogation which it sets up in the present action.

"Without considering the other questions, which is unnecessary, the decree of the Circuit Court is affirmed."

We wish also to refer the Court to the case of M'Kinnon v. New York Assets Realization Company, 217 Fed. 339, decided by the Circuit Court of Appeals for the Second Circuit, which arose over a situation created by the wrongful pledge of

corporate stock owned by a bank, along with stock of another owner as collateral security for the pledgor's individual note, on maturity of which the pledgor tendered payment of the note, which was refused. Subsequently the bank paid the note and received all of the collateral, and thereafter sought the right to exoneration or contribution from the stock of the other owner; the Court holding that the tender by the pledgor, while it did not discharge the debt, extinguished the lien of the pledgee, therefore enabling the bank to recover its own stock without payment of the note, created of the payment by the bank, purely a voluntary tender, held:

> "The complainant also bases his appeal to the aid of a court of equity upon the theory that he is entitled to be exonerated from the payment of the Morse note and to be reimbursed for his payment of the note in accordance with the terms of the judgment against the Metropolitan Trust Company by the proceeds from the sale of the Heinze stock, and that this right of exoneration is recognized solely in equity. The answer to this is that the principle of exoneration is not applicable to the facts of this case. It is true that the 500 shares which belonged to the bank were

taken without consideration to it and used to secure for Heinze the money wherewith to pay for the balance of the purchase price of the shares belonging to Heinze, and that the bank at one time may have been in a position where it would have been entitled to have had the shares of Heinze's stock belonging to it exonerated from the payment of the Morse note. But, whatever its right to do this may have been, it ceased to possess any such right when it voluntarily paid the Morse note. It paid that note as a volunteer, being at the time the payment was made under no compulsion to make it. While the trust company's lien on the stock continued it could not have recovered its own stock without paying the note, but when the trust company lost its lien on the stock by the tender the bank could at once have recovered the stock without paying the Morse note. *One who is under no legal obligation or liability to pay a debt is, if he pays it, a mere volunteer.* In paying the note as a volunteer the complainant lost his right to invoke the principle of exoneration." (The italics are by counsel.)

The very recent case of Citizens' Trust Co. v. Mullinix, 235 Fed. 875, decided by the Circuit Court of Appeals for the Eighth Circuit, recognizes

the very principle contended for. There two notes had been given to respective individuals secured by liens upon the property of a bankrupt lumber company. When the notes matured they were attached to drafts drawn by the lumber company and forwarded to the claimant bank of which the President of the lumber company was the cashier. When these drafts were received by the bank, they were paid and the drafts and notes accompanying the same marked "Paid." As is stated in the decision, for some reason which does not appear, the bank never charged the amount of these drafts to the lumber company on the bank's books. It is said by the Court:

> "The claimant insists that, because the amount of the drafts were not charged to the account of the lumber company upon the books of the bank, the latter is entitled to be subrogated to the lien of the drawers of the draft, as the transaction simply amounted to a purchase of the notes by the bank. This contention cannot prevail. Whether the proper entries were made on the books of the bank or not, the fact still remains undisputed that the drafts and notes were paid when they were presented to the Pemiscot County Bank, and that ended the matter; they now stand as general claims against the bankrupt, but without

preference. The bank, when it paid the drafts and the notes, had no interest of its own to protect, the payments were purely voluntary, and no fact is shown which would entitle the bank to the right of subrogation."

An examination of the digests discloses that in addition to the Federal Courts *every state in the Union* has adopted the rule contended for as is laid down in the cases hereinbefore quoted from. To cite further authority would simply prolong what must of necessity be a somewhat lengthy brief; suffice it to say, that the law is such that the Exchange National Bank cannot under the authority of the decisions of our Courts be subrogated to any rights of the Mechanics Loan & Trust Company, whatever they may be.

IV.

The Trustee acted in bad faith.

It is not our purpose to deny or avoid the rule of law which rewards a trustee who, in the discharge of his duties as such acts in good faith and with care, diligence and dispatch. That rule is too well known to warrant discussion. On the other hand, equally well known and recognized is the rule which deprives that trustee of the right not only to compensation but to reimbursement and allowance of his expenses and liabilities.

In what we have just said, it is not our intention to recognize what we have hitherto denied, namely, the right of the Exchange National Bank to relief, but without waiving our insistence thereto, we wish to be understood as contending that wholly independent of what has been hereinbefore stated, it is our contention that the relations between the Mechanics Loan & Trust Company and the Exchange National Bank on one hand, and the creditors of the Stack-Gibbs Company on the other hand disclose fraud, deceit and bad faith on the part of the two banks.

Beginning with the trip of E. T. Coman, the President of the Exchange National Bank, to Minneapolis in company with C. D. Gibbs and ending with the filing of the so-called "Trust Agreement," within the hour of the filing of a petition in bankruptcy against the Stack-Gibbs Company, the record discloses an endless procession of acts and omissions on the part of the Exchange National Bank and the Mechanics Loan & Trust Company, committed and omitted with such abandon as to be utterly inconsistent with honorable business dealings.

1. Prior to January 1st, 1916, the Exchange Bank had made some relatively small loans to the Stack-Gibbs Company, the state of such loans

having been as follows: In December, 1915, a four thousand dollar loan with a balance note of ten thousand dollars (246); in January, 1916, it was an eight thousand dollar loan with a balance note of fifteen thousand dollars (247); on January 1st, 1916, six thousand dollars with a balance note of fifteen thousand dollars (247). For many months it had been the custom of the Exchange Bank and the Stack-Gibbs Company for the Exchange Bank to take what was, as hereinbefore mentioned, "Balance Notes," being interest bearing notes signed either by the Stack-Gibbs Company or some of its officers, and thereby creating a purported credit with the Exchange Bank, however, upon the agreement that no checks were to be drawn against said account (237). Sometimes these notes were signed by Gibbs (239); sometimes by Tolerton (239); sometimes by Cleland (239), all officers of the Stack-Gibbs Company. The Stack-Gibbs Company invariably paid the interest on these notes (253), but none of these amounts were available to the Stack-Gibbs Company for checking purposes. On December 30th, 1915, two notes were issued, one (Respondent's Exhibit 7) for ten thousand dollars, signed by C. D. Gibbs, and Stack-Gibbs Lumber Company, and one (Respondent's Exhibit 6) for five thousand dollars, signed C. D. Gibbs. Both these notes were entered on the bills receivable reg-

ister of the Exchange Bank (251), and a certificate of deposit was pinned to the five thousand dollar item, and thereafter that five thousand dollars was not entered upon the depositor's ledger of the Exchange Bank. The ten thousand dollar note was entered upon the depositor's ledger of the Exchange Bank as a credit to the Stack-Gibbs Company, "Account number 2," with a notation that no checks were to be honored against that account unless the same were countersigned by E. T. Coman (251-252). At this time the Exchange Bank had extended actual credit to the Stack-Gibbs Company of three thousand dollars represented by an unsecured promissory note and three thousand dollars represented by an escrow deposit for three thousand dollars in cash, payable to the Stack-Gibbs Lumber Company upon the completion of the real estate title as claimed by the Exchange Bank to have been held as collateral security (12).

The books of the Stack-Gibbs Company show what was happening according to the fact, as we contend, that the Stack-Gibbs Company was at that time indebted to the Exchange Bank in the sum of twenty-one thousand dollars, being the aggregate of all of these notes (195-197). On February 14th, 1916, Mr. Coman, acting for the Exchange Bank, collected interest upon the two notes for five thousand dollars and ten thousand

dollars, respectively, until February 14th, 1916, and the Stack-Gibbs Company paid the interest upon these two notes from December 30th, 1915, until February 14th, 1916, aggregating $153.33 (Respondent's Exhibit 1), at which time the notes were canceled and sent by Mr. Coman to the Stack-Gibbs Company (Respondent's Exhibits 1, 6 and 7, page 247). This conduct upon the part of the Stack-Gibbs Company and the Exchange Bank was unlawful, and under Mr. Coman's testimony the contract was usurious, and when analyzed shows that at the time of the making of the Minneapolis contract the Stack-Gibbs Company was paying to the Exchange Bank through dealings had with Mr. Coman personally, usurious interest and the making of these contracts charged Mr. Coman, the Exchange Bank and the Mechanics Loan & Trust Company with knowledge of the fact, wholly independent of the further fact that not only was Mr. Coman within an hour's run of the plant of the Stack-Gibbs Company, but had actually had the books of the Stack-Gibbs Company checked; that the Stack-Gibbs Company was in such financial condition that it was willing to pay eight per cent interest upon the aggregate of twenty-one thousand dollars in order to secure the use of six thousand dollars, three thousand dollars of which was secured by a cash deposit. No debtor which

was in such financial straits that it would make the contracts which Mr. Coman testifies were made between the Stack-Gibbs Company and the Exchange Bank could be in such condition of solvency as would entitle it to continue in business, especially in view of the fact that that condition of affairs has continued for years and was not due to any sudden stress.

At the meeting in Minneapolis, Mr. Coman knowing these facts failed to disclose them to the creditors assembled. In other words, he concealed the facts because his position was such, being an officer and principal owner of the Mechanics Loan & Trust Company, who was to act as Trustee as he was, it was his duty to disclose them. When confronted with this situation, Mr. Coman first testified neither the five thousand dollars nor the ten thousand dollar notes were ever delivered or entered on the bank's record, but that they were simply inchoate transactions (229 and 230). When confronted with the entry on the bills receivable register of the Exchange Bank showing that these notes were entered by the bank as actual loans (234), he then, after consideration, explained the situation by saying that the five thousand dollar loan was always inchoate, the note was never delivered, but the ten thousand dollar note was a balance note (237). When confronted with the

fact that the interest had been paid upon both of these notes, he then testified that the notes had been taken and interest collected, but that the notes were canceled on January 25, 1916 (a date prior to the Minneapolis meeting) (239). When confronted with the fact that interest was paid to February 12th, and that the notes were canceled on the latter date, he was speechless, except to say that the Exchange was at that time securing whatever it could get of the Stack-Gibbs Company, and that he had not had anything personally to do with the transaction (255). Subsequent to the completion of Mr. Coman's testimony, the original notes were found and introduced in evidence, Respondent's Exhibits 6 and 7, which notes show that they were canceled on February 12th, 1916, and Respondent's Exhibit Number 1 being the letter, returning the notes to the Stack-Gibbs Company on February 12th, and signed by Mr. Coman personally.

Armed with this knowledge, Mr. Coman on or about February 1st, 1916, in company with Mr. Gibbs, journeyed to Minneapolis for the purpose of interviewing the large creditors of the Stack-Gibbs Company, and with them they took a deed of trust of all of the property of the Stack-Gibbs Company which had previously been prepared by Mr. Post, attorney for the Mechanics Loan & Trust

Company, and the Exchange Bank (216). Mr. Coman and Mr. Gibbs met with a large number of the creditors of the Stack-Gibbs Company at Minneapolis for several days, culminating in what we have referred to as the Minneapolis contract. Among those present at this meeting were the representatives of all the creditors who ultimately signed the trust agreement, excepting J. K. Stack, Genevieve S. Tolerton and Minnie A. Gibbs. At that meeting, with the consent and acquiescence of Mr. Coman, it was represented by Mr. Gibbs that the Stack-Gibbs Company was in splendid financial condition, that its assets largely exceeded its liabilities, that with leniency on the part of its larger creditors and a sufficient fund in cash to meet its pay-roll and take care of its smaller creditors who might become troublesome, it may be able to work out its indebtedness to all its creditors. And it was asserted to the creditors that fifty thousand dollars would be sufficient money to save the corporation and, at the suggestion of one of the creditors at this meeting, the possible sum which might be advanced if necessity required was by the terms of the contract increased to one hundred thousand dollars (278). We submit that when Mr. Coman went with Mr. Gibbs for the purpose of securing the assent of the creditors to the execution of the trust deed under which

his company was to act as trustee, that he was under the affirmative duty to disclose to those creditors all the facts within his knowledge relative to the financial condition of the Stack-Gibbs Company, and that his silence in the face of the palpable false representations of C. D. Gibbs as to the condition of the Stack-Gibbs Company amounted to fraud upon the balance of the creditors. The record shows, that at the time of this meeting the Stack-Gibbs Company was absolutely insolvent.

At this juncture we deem it advisable under this sub-heading to take the opportunity of answering a question asked by Judge Dietrich in his opinion, that being, namely:

> "So far as appears, the trustee and its allied interests were not deeply concerned. The actual indebtedness held by the Exchange National Bank of Spokane was only $6000.00 and was relatively unimportant. I am wholly at a loss to understand how the Trustee could have had any strong motive of self-interest such as would induce it to assume a large risk in advancing the $100,000.00 authorized by the agreement. What consideration did it have for putting this sum into a tottering business enterprise, unless it believed that the trust agreement,

by which alone it could have protection, was in effect?"

We beg to point out to this Court the fact that in making this assertion and in asking this question Judge Dietrich was in error, for in addition to the $6,000.00 for which the Exchange National Bank signed the so-called trust agreement and which it is apparent the Exchange Bank by signing well hoped to have paid, *the Stack-Gibbs Company on February* 1, 1916, *had an overdraft at the Exchange National Bank of Spokane, of over* $9,000.00, which overdraft was paid contrary to the terms of the agreement by the first moneys received from the total deposit of $100,000.00.

As we have said, the books of the Exchange Bank and the Lumber Company did not agree, owing to the different manner in which, prior to February 1, 1916, the discounted notes were carried upon the books of the respective companies. For instance with respect to the two items aggregating $15,000.00—one for $10,000.00 and one for $5,000.00, the books of the Stack-Gibbs Lumber Company showed that upon the deposit of these two notes a balance stood in favor of the Stack-Gibbs Company at the Exchange Bank, while the books of the bank on the bills receivable ledger showed the transaction of the two notes aggregating $15,000.00

and the account of the Stack-Gibbs Company overdrawn, and in this particular instance to the extent of $9,000.00, as will appear by an examination of Petitioner's Exhibit No. 36½ introducing in evidence at page 209 of the Record. That this overdraft was met by the deposit of the moneys received under the trust agreement, we wish to quote from the testimony of Witness Katz under "Cross Examination" appearing on pages 209 and 210 of the Record:

> "MR. ADAMS: Will you tell the Court what was the balance in the Exchange National Bank to the Stack-Gibbs Lumber Company starting with the first day of January, 1916?
>
> A. The first of January the deposit to the Exchange Bank of Spokane was $28,195.77.
>
> Q. Will you tell us whether or not in making up that item of twenty-eight thousand and some odd dollars, was included in the $15,000.00?
>
> A. Yes, it was included in the $15,000.00.
>
> Q. Now, will you turn to the latter part of January, now at the end of January what was the bank balance in the Exchange National Bank of Spokane?
>
> A. $10,074.11 (175).

Q. Now, starting with the first of February of this same book—I do not mean starting—let us take it down here to February 14th—now on the 14th of February, 1916, what was the state of the account just before that item was charged ,what was the total withdrawals and the total deposits?

A. Total deposits, 078,496.04. The total withdrawals, $72,084.13.

Q. So you had a balance of approximately six thousand dollars in the bank?

A. Correct.

Q. When the $15,000.00 was taken out of your bank balance how much did you have left, or what was the condition of it?

A. It was overdrawn about $9,000.00.

Q. How was that overdraft finally made up, how did you pay the bank that overdraft?

A. Well, I guess any money that came in, money through notes and the money through deposits.

Q. Didn't you deposit and discount one of these five thousand dollar notes in this controversy here?

A. Yes.

Q. That went into that account to make up that balance?

A. Undoubtedly (178).

MR. POST: When was that deposited?

A. $10,000.00 on the 19th.

MR. ADAMS: On the 19th $10,000.00 was used, then what was the condition of this account with the Exchange when you used $10,000.00 of these notes?

A. Well, we still had $5,000.00 overdrawn.

Q. You were still $5,000.00 to the bad?

A. Yes—we kept drawing checks.

Q. Will you go to page 169 under the date of the 24th and see if you used another $5,000.00 note?"

Further as appears on pages 195 and 196 of the Record, in which it is said:

"Q. You find an item on the 15th of $15,000 credited to the Exchange National Bank; when was your attention first drawn to that item?

A. Practically this morning when I looked through the books; I saw at a glance when I talked to you on Saturday—

Q. Who do you refer to by you?

A. Mr. Post, and we talked about that something must be wrong and I looked over it and that item of $15,000.00; when I read those figures out of the books I wasn't asked about it and I didn't mention it.

Q. Was that a part of your first $40,000.00 paid out of those notes that we discounted?

A. It must have been.

Q. How was the balance of that overdraft made up of $6,000.00; wasn't there a $5,000.00 note discounted a few days afterward which helped make up this $6,000.00 overdraft, which helped to pay the Exchange Bank?

A. There was still an overdraft left.

Q. While that overdraft was left did you put in another $5,000.00 note?

A. Yes, in order to square that overdraft we put in another $5,000.00 note on February 24th.

Q. One of those same notes, this note of February 24th that was canceled and afterward renewed?

A. That is correct (148).

Q. Did you write the Fort Dearborn that

you had found $15,000.00 of notes of the Exchange Bank that you had paid?

A. I did not write it to anybody, I did not know it.

Q. There had been an entry made on the books showing all the money paid out for that purpose at that time?

MR. POST: What purpose?

MR. ADAMS: To pay the Exchange Bank out of this $40,000.00?

A. It shows here an entry in the check register.

Q. When was that put on there?

A. February 15th.

Q. Was it actually entered on February 15th?

A. Yes."

Such things as these cannot be considered to be mere oversight on the part of the individual who, for his own gain, not only failed to disclose them, but who takes advantage of the non-disclosure by reaping the reward of his silence.

2. Paragraph 1 of the so-called trust agreement, namely, the Minneapolis contract, provides "That the Trustee shall forthwith take possession of the trust estate as of an estate in fee simple."

The Mechanics Loan & Trust Company did not take possession of the assets of the Stack-Gibbs Lumber Company. Not only is this point an important factor in determining whether or not the Trustee acted in good faith, but it also becomes material in this inquiry as characterizing the conduct of the Exchange Bank in advancing the money which it loaned to the Stack-Gibbs Company as bearing on the question whether or not these advances were made under and in accordance with the terms of the contract in such manner that the advancements become a lien on the property of the Stack-Gibbs Company, or remained a mere unsecured obligation of that corporation. In other words, the question of whether or not the Mechanics' took possession is important as characterizing its subsequent conduct and that of the Exchange Bank as to whether or not the same fell within the contract and the claim became secured, or did not fall within the contract and remained a mere loan of money. The contract itself specified that Katz should be made and remain the agent of the Lumber Company and the Mill Company. Katz' possession of the property if he was in possession, was the possession of the Stack-Gibbs Company *to the exclusion of all others.* The Mechanics' was in contractual relation with the Mill Company and therefore without the disclosure

of each and every of the creditors and their consent thereto. It was not competent for the Mechanics' to make Katz its agent, or to make possession by the corporation its possession. The pretense of possession by the Mechanics Loan & Trust Company was a mere sham. The only testimony in that regard consisted of a letter from the Mechanics Loan & Trust Company to Katz, uncommunicated to any other person, in which the Mechanics Loan & Trust Company said to Katz, "You are now in possession as the agent of the Mechanics Loan & Trust Company." This was palpably false and fraudulent because the contract under which the Mechanics Loan & Trust Company now claims, specifies that Katz's function should be that of active manager of the company, and not that specified in the secret correspondence between Katz and the Mechanics Loan & Trust Company. Outside of the reply by the corporation, signed by Katz, not an act was done by the Mechanics Loan & Trust Company, or any one in its behalf looking towards the management of the business. *Before Katz had arrived in Spokane forty thousand dollars of the money of the Exchange National Bank had been loaned to the Stack-Gibbs Company,* and on the day of his arrival, February 16th, 1916, twenty thousand dollars additional moneys were so loaned to the Stack-Gibbs Company (Petitioner's

Exhibit No. 31). It thus appears that not only had a total of sixty thousand dollars of the one hundred thousand dollars sought to be recovered was advanced before any pretense of possession was taken by the Mechanics Loan & Trust Company, but before Katz had taken charge of his duties in any capacity. *Not only is this true, but it also appears that the very contract and agreement under which the Exchange Bank seeks to recover was not executed by the Stack-Gibbs Company until twelve days thereafter, to-wit, February 28th,* 1916 (*Petitioner's Exhibit* 14), *and was not executed by the Mechanics Loan & Trust Company until the 29th day of February,* 1916. The italicized portion of what has been last been said might well be made the topic of a separate heading in this brief, as it, in our judgment, utterly precludes the Exchange Bank from maintaining its position upon any theory as to that sixty thousand dollars, but as we have said, this brief must of necessity be drawn to too great length.

3. Paragraph 2 of the so-called trust agreement provides, "The Trustee may in its discretion, but shall not be required to, carry on the whole or any part of the business heretofore conducted by the Lumber Company and the Mill Company"; under this provision it was optional with the Mechanics Loan & Trust Company to do one

of two things, either to close the business, realize upon the assets and distribute the same, or to do the very thing which the creditors had empowered it to do, namely, to operate the business. The record discloses that it did neither. It simply drifted, the business continued exactly as it had before the so-called trust agreement was executed, not a thing was done by the Mechanics Loan & Trust Company with respect to the operation of the business or the marshalling of the corporate assets. Except for the interjection of Katz as an officer of the company the Stack-Gibbs Lumber Company pursued the even tenor of its way, and always with the idle acquiescence of the Mechanics Loan & Trust Company, in a downward direction. This great trust imposed upon the Mechanics Loan & Trust Company by creditors whose claims aggregated in excess of half a million dollars, was absolutely abandoned to the mismanagement of those who had previously shown themselves utterly disqualified to handle the affairs of the corporation. How can the position of the Mechanics Loan & Trust Company and the Exchange Bank, which seeks to be its privy, be considered as consistent with good morals, good business and the fiduciary relationship of a trust company? We hazard the suggestion that this question will go unanswered.

4. Paragraph 4 of the so-called trust agreement

is as follows: "The Trustee shall collect such debts owing to the Lumber Company and the Mill Company as are collectible in the exercise of ordinary diligence." *The Trustee collected not a single dollar.*

5. Paragraph 5 of the so-called trust agreement reads as follows: "The Trustee shall realize upon the trust estate as rapidly as in its judgment it is possible to do so without unreasonable sacrifice thereof." The Trustee realized nothing except increased obligations of the company, as Respondent's Exhibit 4 (pages 301, 302, 303, 304, 305, 306), disclose that between February 1st, 1916, and July 29, 1916, the business was operated at a loss and heavy obligations incurred.

6. Paragraph 10 of the so-called trust agreement reads as follows: "The Trustee shall advance such sum of money as it deems necessary to meet the payroll of the Lumber Company and the Mill Company and to discharge the claim of the creditors who do not execute this agreement, as it may deem necessary or requisite to protect the trust estate, not to exceed, however, the sum of One Hundred Thousand Dollars."

While it cannot be said that the Trustee advanced the sum of One Hundred Thousand Dollars, it can be said that such moneys as were advanced

by the Exchange National Bank, which, if it receive the benefit of the so-called trust agreement, must accept with it the liabilities thereof, were placed without restriction to the credit of the Stack-Gibbs Lumber Company, not under the supervision of the Mechanics Loan & Trust Company that the payroll might be met and the disturbing creditors paid; but to the unrestrained pen of that officer of the Stack-Gibbs Company, whose privilege it was to draw upon those funds for such purpose as he saw fit, and limited only by his own whim and caprice.

We charge, and without fear of denial, that this breach of trust on the part of the Mechanics Loan & Trust Company, as much as any other single thing, has led to the great catastrophe now on parade before this Court. This, as much as any other item of neglect on the part of the Trustee led to the failure of the very object and purpose for which the agreement was executed, namely, the consolidation of the large creditors and the payment of those small creditors who would not be bound by and some who could not be asked to execute the agreement.

A more wanton display of neglect and malfeasance it has never been our duty to observe. It is simply astounding that such action could

happen and upon any theory receive the sanction of a court of justice.

But assuming, difficult though that may be, that all the parties were acting in good faith, the Exchange National Bank in demanding the return of the sum of One Hundred Thousand Dollars must be held to that great principle of equity which recognizes that as between two innocent persons, the loss must fall upon him whose act or neglect has caused the injury.

V.

The so-called trust agreement never became operative due to the fact that ninety per cent of the creditors never executed the same.

Paragraph 20 of the instrument provides as follows:

> "This instrument shall not take effect until creditors representing ninety per cent in the amount of the indebtedness of the Lumber Company have attached their signatures hereto."

That this is a condition precedent there can be no doubt. As far back as 1843, the Honorable John McLean, Circuit Justice, in the case of Lawrence vs. Davis, Federal Cases, No. 8137, in construing a similar provision contained in an assignment for

the benefit of creditors providing that the assignee shall render an account to a major part of the creditors, "And that they shall sanction the assignment before it can take effect," it was said:

> "It is earnestly averred that the acquiescence of a majority has not been shown. 2 Story, Contract, 302, 303; Gerard vs. Lord Lauderdale, 11 Eng. Ch. 451, 3 Sim. 1. This last objection has not been answered and it seems fatal to the assignment. A majority of the creditors have not assented to it, and without this by the terms of the assignment, it cannot take effect."

Let's turn to the facts. The undisputed evidence (Respondent's Exhibit 3) concerning the indebtedness of the corporation, is as follows:

On February 1st the Stack-Gibbs Company was actually indebted in the sum of $861,853.27. Of this sum there was on the corporate books		$636,519.35
90% of which aggregates	$572,867.41	
There was not on the books		40,333.92
90% of which is	36,300.52	
And there were not on the books the claims of Hess, Searle and Stack, amounting to		195,000.00
90% of which is	175,500.00	

Of the creditors making up the $636,519.35 on the books of the corporation, the aggregate of $444,940.00 signed the trust deed. None of the creditors making up the $40,333.92 not on the books of the corporation signed the trust deed. Searle, Stack and Hess, aggregating $195,000.00, signed the trust deed. The claims of Searle, Stack and Hess amounting to $195,000.00, were indebtedness due those individuals from the Dryad Lumber Company, and the Stack-Gibbs Lumber Company had executed contracts whereby it guaranteed the payment of this indebtedness, and such guarantee did not appear on the books of the corporation. The item of $40,333.92 not appearing on the books of the corporation, consisted of taxes, freight charges, loan made upon the insurance policy of the life of C. D. Gibbs, account for railway materials furnished and certain logging contracts, as will particularly appear by reference to Respondent's Exhibit No. 3. The term of the contract under discussion is plain and specific and it is immaterial whether the Court construes the expression 90% of the amount of the indebtedness of the Lumber Company to refer to the indebtedness shown by the books of the corporation, or construes such expression to refer to the entire indebtedness. If it refers only to the indebtedness shown by the books of the corporation,

then, as we have seen, the aggregate of such indebtedness is $636,519.35, 90% of which is $572,-867.41, and it does not include the indebtedness of Searle, Stack and Hess, aggregating $195,000.00. The total amount of indebtedness due creditors signing the trust agreement aggregates $636,519.35 (Petitioner's Ex. No. 14). If we deduct the signatures of Searle, Stack and Hess, then the total amount of creditors shown on the books of the corporation who signed the trust agreement aggregates $444,940.00, or less than 90% of the creditors of the Stack-Gibbs Company. If the Court construes the contract to include all the creditors of the Stack-Gibbs Company, whether on the books of that corporation or not, then the total indebtedness of the corporation aggregates $871,853.27 and the number of creditors who signed, aggregating $639,940.56, is less than 74% of the creditors, so that by either alternative the number of creditors of the Stack-Gibbs Company who attached their signatures to the trust agreement was less than 90%, and by the above quoted contract, the instrument did not take effect. This condition on the execution of the contract is put in as an express provision. It was vital to the signing creditors for the reason that that paragraph of the contract which authorizes the advancement of the $100,000.00 now claimed to be a lien as against

these signing creditors, authorizes such money to be paid out by the Trustee for but two purposes, one to meet the current payroll of the Stack-Gibbs Company and the other to pay off such portion of the 10% of the creditors who did not sign the agreement who should become troublesome and as the Trustee should determine to pay. If the number of such non-signing creditors who were not bound to have barred the collection of their claims was 10% or less, then the $100,000.00 authorized to be advanced would be sufficient for the purpose, but if such creditors reached 30%, the probability of the success of the scheme agreed to by the creditors would be very much decreased. The creditors signing the agreement thereby extended their indebtedness and deprived themselves of all process for the collection of such indebtedness, and created a possible claim prior to their own only in the event that a sufficient number of creditors should sign so that the aggregate thereof should be at least 90% of all the creditors of the company.

The fact that less than 90% of the creditors of the company did not sign is admitted by the petitioners, but the petitioners seek to avoid the plain terms of the contract by two methods. They first say it was understood at Minneapolis that when the signatures of J. K. Stack and Mrs. Tolerton

(neither of whom was present) had been added to the agreement that that would constitute 90%, and they say, second, that the provision that 90% of the creditors must sign did not refer to certain of the creditors to whom the Stack-Gibbs Company had become indebted, for the reason (a), some of those debts were to be discharged in lumber; (b), some were secured; and (c), the existence of others is disputed.

As to the first of these positions, to-wit, that it was understood and agreed at Minneapolis that paragraph 20 of the trust agreement (Ex. No. 14), would have been complied with upon the contract being signed by J. K. Stack and Mrs. Tolerton, this position is predicated upon the testimony of Mr. Coman and from certain letters and telegrams subsequently sent by Mr. Aaron. The Coman testimony must be disregarded for the reason that it is parol evidence offered for the purpose of varying the terms of a written contract and went in over respondents' objections. Mr. Coman's testimony was as follows:

> "Mr. Gibbs submitted a statement of his assets and liabilities at Minneapolis and a copy of that statement was furnished not only to us but to all the other creditors there, and the way we figured it out was when we sub-

mitted it to Mrs. Tolerton that completed the necessary signatures by them, or the 90%." (220.)

This was plainly a negotiation leading up to the execution of a written instrument which is plain and unambiguous, and such testimony is excluded by every court under the fundamental principles of the law of evidence. But furthermore, the testimony does not establish what is claimed for it. The testimony falls short of any statement that it was agreed by any of the creditors that the signatures of Mrs. Tolerton and J. K. Stack should be accepted as a compliance with that term of the contract, and only shows that tentatively this was the assumption of all the parties at Minneapolis, but the contract further provides (paragraph 21), that the contract should not take effect until a stockholders' meeting had been held, Katz had been elected Trustee, etc., plainly showing that it was not intended by the makers of the contract that the contract should go into effect upon the signature of Mrs. Tolerton and J. K. Stack, but the contract could not take effect until opportunity for further investigation by the Mechanics and all parties interested. As a matter of fact, an inspection of the contract will show that it was not executed by the Mechanics until very late in the month of February, and its execution was not

authorized by the Stack-Gibbs Company until February 18th at least, although the petitioners contend that they were acting under this non-executed contract as early as February 9th.

The letters and telegrams of Mr. Aaron and Mr. Coman (Petitioner's Ex. Nos. 34, 42, 43, 44, 46 and 47), bind no persons at th eoutside except the Exchange, Fort Dearborn National Bank and Merrill, Cox & Company, only three of these numerous signers, whereas there is no pretense that either J. K. Stack, Minnie A. Gibbs or Genevieve S. Tolerton had any knowledge whatsoever of such understanding. Those letters and telegrams are inadmissible for the purpose for which they were introduced, and an inspection of them will show that they do not contain a single element of any waiver of this term of the contract.

The Stack-Gibbs Company knew who its creditors were. The Mechanics and Exchange had the means of knowledge and were charged with the duty of ascertaining who such creditors were. Mr. Coman, the agent of the Mechanics and the Exchange, was in Minneapolis actively assisting the Stack-Gibbs Company in bringing about the execution of this contract, and was possessed of the opportunity of easily and definitely ascertaining whether this term of the contract had been com-

plied with. At Spokane he was within an hour's run of absolute and definite information. It will be noted in this connection that Mr. Coman did not disclose to the creditors at the Minneapolis meeting that the Stack-Gibbs Company was willing to borrow and had been borrowing from $4,000 to $8,000 and had been paying interest on $14,000 to $21,000 in consideration of the making of such loan, or in other words, had been paying to the Exchange from 30% to 40% per annum interest on bank borrowings from his bank, and he did not disclose to the creditors that the Exchange was at that time collecting interest from the Stack-Gibbs Company on $21,000 for an actual loan of $6,000, which was interest at the rate of 35% per annum, and one-half of this loan was secured, but concealed the circumstances from the other creditors and traveled fifteen hundred miles to induce the creditors of the Stack-Gibbs Company to enter into this agreement, and under the circumstances shown, the corporations of which he was the head should not be permitted to escape the responsibility to the other signers of determining the facts so easily within their ascertainment. Mr. Aaron's belief that the signature of Mrs. Tolerton would constitute the necessary 90% of the creditors was based upon the representations made at the Minneapolis meeting by Mr. Gibbs at least in the pres-

ence of Mr. Coman. If he had any information on this subject it was communicated to him by Mr. Gibbs or Mr. Coman. The signing creditors were widely scattered. As we have seen, at least three of them were not at the Minneapolis meeting and were not affcted by any arrangement or understanding thereat of which they could have had no knowledge. We submit that it is a fact that 90% of the creditors did not sign the agreement, and by the terms of the contract the signature of 90% was a condition precedent to the fulfillment of the contract, and whoever claims under the contract must show that such condition was complied with in fact, and that the Mechanics, if it was deceived, had no right to rely upon the deception with the means of accurate information at hand, and if deceived at all was not deceived by any creditor who signed this contract.

We will next consider the assertion that certain of the indebtedness of the Stack-Gibbs Company should be excluded from the computation.

1st. Indebtedness amounting to $40,333.92 not on the books shown on page 3 of Respondents' Exhibit No. 3. As to this item, the Mechanics, the Exchange and the non-signing creditors were equally ignorant, but there is no reason why the responsibility for that ignorance should fall on

the signing creditors. The contract provides that it should not take effect until 90% shall have signed, and the sound rule of construction is that whoever claims to act under the contract must ascertain that the conditions precedent to the validity of the contract have been complied with. As to the petitioners' contention that unless the responsibility for knowledge of the number and amount of the Stack-Gibbs Company's indebtedness is placed upon the respondents, the contract will operate as a snare is best answered by the proposition that it was incumbent upon any one acting under this contract to ascertain the facts at his period, and that where all the parties were equally ignorant, the loss arising from such ignorance must fall upon him who acted without adequate information.

2nd. Petitioners insist that the indebtedness of the Exchange in computing the 90%, should be counted at $6,000 instead of $21,000. We have already seen that by the view most favorable to the petitioner, the facts were that the Exchange then had the interest bearing obligations of the Stack-Gibbs Company, aggregating $21,000, which it was carrying upon its books and representing to the bank examiner and to the public as valid interest bearing obligations of the bank, and upon which it collected interest, and which it subsequently canceled upon the payment of all interest

accrued on February 12th, and by cancelling the certificate of deposit representing the $5,000 and charging off the balance theretofore carried on its books as a deposit under Account No. 2. The bank's own books on February 1st showed that the Stack-Gibbs Company was indebted to the Exchange in the sum of $21,000 and that it had assets in the hands of the Exchange aggregating $15,000. The Stack-Gibbs Company's books showed the same state of facts (195, 196, 197). The contract was unlawful and usurious. We submit that no court should treat with any respect whatever the contention that the $15,000 represented by the two notes (Respondents' Ex. Nos. 6 and 7) was not indebtedness of the Stack-Gibbs Company to the Exchange.

It is next urged that the overdraft of $15,431.09 at the Exchange National Bank of Coeur d'Alene City should be included in computing the 90% of the creditors of the Stack-Gibbs Company. The situation there shown was simply this: The books of the Coeur d'Alene Bank showed no overdraft on February 1st. The books of the Stack-Gibbs Company showed an overdraft as stated. The books of both institutions are correct. It arose in this way: In conducting its business the Stack-Gibbs Company issued checks in the course of business. When the checks were issued they were credited

to the bank on the books of the company. Several days would intervene before the checks could be presented for payment. By the time checks were presented deposits would have been made to take care of the checks, and other checks were then outstanding, but the checks were issued in payment of indebtedness of the Stack-Gibbs Company. When the checks were issued, the theretofore existing indebtedness of the Stack-Gibbs Company was entered as paid, therefore the argument of the petitioners that this $15,431.09 should be excluded from the amount of the debts of the Stack-Gibbs Company falls to the ground for the reason that if it be conceded that the overdraft did not exist to the Coeur d'Alene Bank, then the claims of the creditors to whom those $15,431.09 checks had been issued, had not been paid and the indebtedness existed as an indebtedness of the corporation to those creditors, and it is therefore plain that this indebtedness of $15,431.09 did exist either in the form of overdrafts at the Coeur d'Alene Bank, as was shown by the books of the Stack-Gibbs Company or it existed in the form of indebtedness of the creditors to whom the checks were given, and therefore the item was and must be included as indebtedness of the Stack-Gibbs Company to some one. If it was indebtedness to anyone, it goes to make up the total with other claims, 90% of which

must be signed for. It is further contended that the claim of the Central Warehouse & Lumber Company and other claims amounting to $32,948.40 should be excluded from the computation of this 90% for the reason that the same was to be payable in lumber. A portion of the indebtedness sought to be excluded by the petitioners was upon contracts for the sale of lumber. The argument of the petitioners is based upon a technical definition of the word "indebtedness." It is true that the word "indebtedness" as used, for example, in the garnishment statute has been given a narrow definition, but this definition is entirely too narrow as applied to the contract in suit. The obligation of the creditors who were to be paid in merchandise can only be measured by the courts in money. No contracts by the Stack-Gibbs Company for the delivery or payment in lumber could ever be enforced specifically. Indeed, the contracts in every instance called for the payment of money and not merchandise. The lumber agreed to be delivered was an asset of the corporation to be used for the payment of its debts. The reason for the insertion of the 90% clause in the contract, as we have said, was to secure a sufficient number of signers so that the $100,000 which the contract authorized the Trustee to advance would be sufficient to meet the payroll and pay the re-

maining creditors who might become troublesome. The creditor whose account was payable in lumber was just as much a creditor and could become more troublesome than the creditor whose account was payable in cash. The collection of such a claim by taking lumber directly depleted the assets of the Stack-Gibbs Company, and would effectually paralyze that company and such creditors were doubly likely to be troublesome because they had claims against both cash and property. We can see no reason based on the language of the contract, the purpose to be effected or the reason and spirit thereof, which would authorize the excluding of those creditors from the 90%.

As to the Youman claim for $19,500, excluded by the petitioners from the computation of the 90%, that was an indebtedness upon promissory notes calling for the payment of money upon which the creditor claimed he had security by way of a pledge of a part of the assets of the corporation. That claim, therefore, was not only indebtedness in its strictest sense, but it was indebtedness of the highest type according to Mr. Youman's contention, to-wit, indebtedness upon which specific assets of the corporation could be taken from the corporation upon a foreclosure. Certainly no argument can be made that the Youman claim should be excluded from the computation. The argument

that Mr. Youman and other creditors should be counted as having signed the contract, while ingenious, can best be answered by an inspection of the document. They did not sign; their names are not there.

Unless the bank can successfully contend that each and every of these items are to be excluded from the computation, then the contract falls by its own terms and the contract never took effect and cannot bind the parties to the agreement, and no party can base any right thereon. The argument made by petitioners that because Mr. Aaron believed and relied upon the representations made by Mr. Gibbs and Mr. Coman at Minneapolis as to the amount of the creditors of the Stack-Gibbs Company, therefore the Mechanics can rely upon the fact that Mr. Aaron relied upon the truth of those representations, and therefore, although Mr. Aaron never represented any creditors except the Fort Dearborn National Bank and possibly Merrill, Cox & Company, yet nevertheless the Shoshone Lumber Company and the Idaho Timber Company, S. H. Hess and Genevieve Tolerton of Minneapolis, Minnie A. Gibbs of Spokane, J. K. Stack of Escanaba, Michigan, and I. F. Searle and First National Bank of Lincoln, Nebraska, the creditors whom Mr. Aaron never represented, are estopped from availing themselves of a plain

provision of the contract inserted for their protection and are deemed to have waived this term of the contract, is so lacking in every element of soundness as to be refuted by its mere statement. This should end the consideration of this case.

However, there is just one authority we wish to cite upon this subject which affects the contended error in the record, which permitted the testimony of Coman to explain what had been intended and understood by the term "ninety per cent." That is reported in the case of Bell vs. Mendenhall, 78 Minn. 57; 80 N. W. Rep. 843. An assignment for the benefit of creditors was made under a contract providing for the payment by one of the parties to the assignment of "all of the outstanding indebtedness" of the other parties, two in number, "not to exceed in the aggregate the sum of $130,000." It was sought in the trial court to introduce evidence tending to show that certain indebtedness was not included under the agreement, with respect to which the Court said:

> "The trial court excluded and rejected certain written and oral testimony which was offered by the trust company for the avowed purpose of explaining the intent of the parties to the trust contract when using the words 'outstanding indebtedness' therein, and to show that the claims herein involved were not among

those which, up to the limit of $130,000, the trustee had agreed to pay, and that just what debts were within the contract, and to be provided for by it, were well known and agreed upon by the parties at and prior to its execution, May 1, 1893. The rejected written instruments were, with one exception, of an earlier date than the contract, and consisted of letters from Mr. Mendenhall to the officers of the trust company, and an alleged list or schedule or liabilities prepared by him and transmitted pending the negotiations. The claims now in controversy were not in this list. The oral testimony was of conversations between Mr. M. and the officers, prior to the contract, tending to show that certain debts specified in the list, and none other, were covered by the words 'all of the outstanding indebtedness' of the Mendenhalls. The effect of this class of evidence, if received and relied upon by the court when making its findings, would have been to cut down and limit the liability of the trust company to the debts expressly mentioned in the list or schedule before mentioned as having been submitted by Mr. M. when he proposed to the company that it become trustee, but in no manner referred to or made a part of the contract, in which

it was stipulated that the indebtedness to be taken care of was 'all of the outstanding indebtedness of said second parties,' not exceeding $130,000. Not the debts or liabilities listed and scheduled at some prior time, and in which list no mention was made of the liability incurred when the Mendenhalls, either prior to the delivery, and for the purpose of giving additional credit thereto, or as endorsers—and it is not material which,—placed their names on the back of the James note, but all of the outstanding indebtedness. The phrase 'all indebtedness' included all pecuniary liabilities of each and both of the debtors, present, or already incurred, but to mature in the future. 'Indebtedness' is a word of large meaning, and is used to denote almost every kind of pecuniary obligation originating in contract. It must be held to cover the debtor's joint as well as his several liabilities, and also his liabilities contracted by indorsement, whether then due or to become due. Merriman v. Manufacturing Co., 12 R. I. 175; Railway Co. v. Lundstrom, 16 Neb. 254, 20 N. W. 198; City of Valparaiso v. Gardner, 97 Ind. 1; Scott v. City of Davenport, 34 Ia. 208. To give any weight to the evidence in question would be to vary a written contract by parole,

—make a new contract for the parties; for, as was said when the case was here before, the covenant to pay is clearly and concisely expressed,—has no uncertainty in its meaning,—and the promise was for the equal and ratable benefit of all the creditors. The character of conclusiveness is given to written instruments deliberately adopted by the parties as embodying their final agreements, and as to the terms, conditions, and limitations thereof the written contract must speak for itself. Nor will a party, under the guise of knowing what the real consideration of a contract was, be permitted to cut down or vary the stipulations of his written covenant by proof of a parol agreement, either antecedent to or contemporaneous with the writing. Bruns vs. Schreiber, 43 Minn. 468, 45 N. W. 861; Sayre v. Burdick, 47 Minn. 367, 50 N. W. 245; 2 Pars. Cont. 680. The attempt to show that, prior to the execution of the contract in which the trust company agreed to pay all of the indebtedness, it was the verbal understanding that only a part should be paid, was properly excluded by the court below."

CONCLUSION.

Because of the facts appearing in the record before this Court as referred to in the foregoing argument and the cases cited, we contend that for the various reasons stated the claim of the Exchange National Bank, if at all allowed, should be allowed as that only of an unsecured creditor without preference or priority over the claims of appellants or any other of the creditors of the estate of the Stack-Gibbs Lumber Company, bankrupt, and without the right of securing unto itself the dividends payable to appellants, and which have long been withheld, and we ask that the order of the District Court appealed from be reversed and remanded with directions to deny the prayer of the petition of the Mechanics Loan & Trust Company and the Exchange National Bank.

Respectfully submitted,

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